No. 02-1315 Status: ARGUED
Title: Gary Locke, Governor of Washington, et al., Petitioners
v.
Joshua Davey
Docketed: March 11, 2003
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (00-35962)
Decision Date: July 18, 2002
Rehearing Denied: November 26, 2002

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Feb 24 2003	Petition for writ of certiorari filed. (Response due April 10, 2003)
Apr 10 2003	Brief amici curiae of Institute for Justice, et al. filed.
Apr 10 2003	Brief of respondent Joshua Davey in opposition filed.
Apr 21 2003	Reply of petitioners Gary Locke, Governor of Washington, et al. filed.
May 19 2003	Petition GRANTED.
Jun 25 2003	Extension of time within which to file the joint appendix and petitioners' brief on the merits to and including July 17, 2003.
Jul 17 2003	Brief amici curiae of Anti-Defamation League, et al. filed.
Jul 17 2003	Brief amici curiae of American Civil Liberties Union, et al. filed.
Jul 17 2003	Brief amici curiae of American Jewish Congress, et al. filed.
Jul 17 2003	Brief amicus curiae of National Education Association filed.
Jul 17 2003	Brief amici curiae of National School Boards Association, et al. filed.
Jul 17 2003	Brief amici curiae of Historians and Law Scholars, et al. filed.
Jul 17 2003	Joint appendix filed.
Jul 17 2003	Brief of petitioners Gary Locke, Governor of Washington, et al. filed.
Jul 17 2003	Brief amici curiae of Vermont, et al. filed.
Aug 5 2003	Extension of time within which to file respondent's brief on the merits to and including September 7, 2003.
Aug 7 2003	Blanket consent to the filing of amicus briefs in support of the respondent received from counsel for the respondent.
Sep 5 2003	Brief amicus curiae of Solidarity Center for Law and Justice, P.C. filed.
Sep 5 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Sep 8 2003	Brief amicus curiae of Teresa M. Becker filed.
Sep 8 2003	Brief amicus curiae of the United States filed.
Sep 8 2003	Brief amici curiae of Conference of Catholic Bishops, et al. filed.
Sep 8 2003	Brief amicus curiae of The Fairness Foundation filed.
Sep 8 2003	Brief amicus curiae of National Jewish Commission on Law and Public Affairs ("COLPA") filed.
Sep 8 2003	Brief amicus curiae of Black Alliance for Educational Options filed.
Sep 8 2003	Brief amici curiae of Religious Universities and Colleges, et al. filed.
Sep 8 2003	Brief of respondent Joshua Davey in opposition filed.
Sep 8 2003	Brief amici curiae of States of Texas, Mississippi and Utah filed.

Sep 8 2003	Brief amicus curiae of Landmark Legal Foundation filed.
Sep 8 2003	Brief amici curiae of Becket Fund for Religious Liberty, et al. filed.
Sep 8 2003	Brief amicus curiae of Liberty Counsel filed.
Sep 8 2003	Brief amici curiae of Institute for Justice, et al. filed.
Sep 8 2003	Brief amicus curiae of Alabama filed.
Sep 8 2003	Brief amicus curiae of Council for Christian Colleges & Universities, et al. filed.
Sep 8 2003	Brief amicus curiae of Florida, et al. filed.
Sep 8 2003	Brief amicus curiae of Common Good Legal Defense Fund and Your Catholic Voice Foundation filed.
Sep 8 2003	Brief amicus curiae of National Legal Foundation filed.
Sep 24 2003	SET FOR ARGUMENT Tuesday, December 2, 2003
Sep 25 2003	CIRCULATED.
Oct 6 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 14 2003	Reply of petitioners Gary Locke, Marcus Gaspard, Bob Craves & John Klacik filed. (Distributed)
Oct 23 2003	Record received from the U.S.C.A. for the 9th Circuit. (1 envelope)
Oct 24 2003	Record received from the U.S.D.C. for the Western Dist. of Washington. (1 box)
Dec 2 2003	Argued. For petitioners: Narda Pierce, Solicitor General, Olympia, Wash. For respondent: Jay A Sekulow, and on behalf of the United States, as amicus curiae, Theodore B. Olson, Solicitor General, Department of Justice, Washington, D.C.

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, ET AL.,

Petitioners,

v.

JOSHUA DAVEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Washington Constitution provides that no public money shall be appropriated or applied to religious instruction. Following this constitutional command, Washington does not grant college scholarships to otherwise eligible students who are pursuing a degree in theology. Does the Free Exercise Clause of the First Amendment require the state to fund religious instruction, if it provides college scholarships for secular instruction?

PARTIES

The parties to the proceeding below were:

Petitioners: Gary Locke, Governor of the State of Washington; Marcus S. Gaspard, Executive Director of the Washington Higher Education Coordinating Board; Bob Craves, Chair of the Higher Education Coordinating Board; and John Klacik, Associate Director of the Higher Education Coordinating Board. Petitioners were aligned as defendants/appellees below.

Respondent: Joshua Davey. Respondent was aligned as plaintiff/appellant below.

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Washington, on behalf of Washington Governor Gary Locke and officials of the Higher Education Coordinating Board, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 299 F.3d 748. App. 1a. The court's order denying the petition for rehearing and for rehearing en banc is unpublished. App. 86a. The opinion of the United States District Court for the Western District of Washington is also unpublished. App. 51a.

JURISDICTION

The judgment of the Ninth Circuit was entered July 18, 2002. On November 26, 2002, the court of appeals issued an order denying a timely petition for rehearing and petition for rehearing en banc. App. 86a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Free Exercise Clause of the First Amendment to the United States Constitution provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]."

The Washington Constitution article I, section § 11 provides, in part:

> "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment[.]" App. 88a.

Wash. Rev. Code § 28B.10.814 provides: "No aid shall be awarded to any student pursuing a degree in theology." App. 92a.

Other relevant statutes and regulations are set out in the appendix. These include the legislative appropriation that began the Promise Scholarship program (App. 89a), the regulations adopted to implement the program (App. 97a), and the statutes establishing the program on a continuing basis (App. 92a).

STATEMENT

This case concerns a challenge to Washington's Constitution and a state statute that prohibit using public funds to pay for religious instruction. The question is whether the Free Exercise Clause of the First Amendment of the United States Constitution requires the state to pay for religious instruction when it pays for secular instruction.

1. Since statehood in 1889, the Washington Constitution has guaranteed every individual "[a]bsolute freedom of conscience in all matters of religious sentiment, belief and worship[.]" Wash. Const. art. I, § 11; App. 88a. The 1889 Constitution also requires a strong separation between church and state. The Washington Constitution commands that "*[n]o public money* or property *shall be*

appropriated for or applied to any religious worship, exercise or *instruction*, or the support of any religious establishment[.]" Wash. Const. art. I, § 11; App. 88a (emphasis added).

The Washington Supreme Court has interpreted this constitutional command to prohibit using public funds to pay for "that category of instruction that resembles worship and manifests a devotion to religion and religious principles in thought, feeling, belief, and conduct". *Calvary Bible Presbyterian Church v. Bd. of Regents*, 72 Wash. 2d 912, 919, 436 P.2d 189, 193 (1967), *cert. denied*, 393 U.S. 960 (1968). To implement this constitutional requirement, the Washington Legislature adopted Wash. Rev. Code § 28B.10.814, which provides: "No aid shall be awarded to any student pursuing a degree in theology." App. 92a.

2. In 1999, the Washington Legislature created the Promise Scholarship program, to be administered by the Higher Education Coordinating Board (HEC Board).[1] The purpose of the program was to provide scholarships to high school graduates with high academic marks who may not have the financial ability to attend college. The scholarship is

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[1] The Promise Scholarship began as a pilot program in the 1999 appropriations act. 1999 Wash. Laws ch. 309(6)(i); App. 89a. The HEC Board was directed to evaluate the impact and effectiveness of the program and report to the Governor and the Legislature. 1999 Wash. Laws ch. 309(6)(i)(vii); App. 91a. Subsequently, in March 2002, the Promise Scholarship was adopted as a continuing statutory program. *See* Wash. Rev. Code § 28B.119.010; App. 92a.

awarded for the first year of college and may be renewed for a second year. To be eligible for a Promise Scholarship, applicants must meet academic and financial requirements. For example, to qualify for a scholarship for the 1999-2000 school term, applicants had to be in the top 10 percent of their high school class and have a family income that did not exceed 135 percent of the state's median family income.

A student who is eligible for a scholarship must also meet enrollment requirements to receive the money. First, the student must be enrolled at an accredited public or private college, university, or career training school located in Washington. Private sectarian institutions are eligible—so long as they are accredited. Second, the student must be enrolled at least half-time at the eligible institution. Finally, as required by article I, section 11 of the Washington Constitution and Wash. Rev. Code § 28B.10.814, the student must not be pursuing a degree in theology at the institution. To receive the money, the eligible institution must apply for the funds on the student's behalf and verify to the HEC Board that the student is enrolled, at least half-time. The institution must also verify that the student is not pursuing a degree in theology. It is left to each institution to determine what part of its own academic program constitutes a degree in theology. If the student meets the enrollment requirements, the scholarship check is sent to the institution to be disbursed to the student.

3. In 1999, respondent Joshua Davey applied for a Promise Scholarship. Davey met the academic and financial requirements, and Governor Locke and the HEC Board notified Davey that he was eligible for a Promise Scholarship for the 1999-2000 academic term. The amount of the scholarship was $1,125. In the fall of 1999, Davey was admitted to Northwest College, which is an accredited college located in Washington. As such, Northwest is an eligible institution under the Promise Scholarship program. Northwest is also a sectarian college that educates its students from a distinctly Christian point of view. Davey declared a double major in Pastoral Ministries and Business Management and Administration. Northwest College determined that under its academic program, a major in Pastoral Ministries constitutes a degree in theology. Since Davey did not meet this enrollment requirement, Northwest did not apply for Promise Scholarship funds on his behalf and no funds were disbursed to him. If the college had reported that Davey was pursuing a degree in theology at Northwest, the HEC Board would not have sent the scholarship check.

4. In February 2000, Davey brought suit in the United States District Court for the Western District of Washington against the Governor of Washington and officials of the HEC Board, in their official and individual capacities (collectively, the HEC Board). Davey alleged violations of the First and Fourteenth Amendments of the United States Constitution, as well as provisions of the Washington Constitution. Davey sought a declaratory judgment

that Washington's refusal to fund his degree in theology was unconstitutional. Davey also sought an injunction, damages, and attorneys fees.

The parties filed cross-motions for summary judgment, and the District Court entered an order granting summary judgment to the HEC Board. App. 51a. The District Court ruled that Davey's Free Exercise claim failed because it mistakenly presumed a right to have Washington taxpayers fund his religious instruction. The District Court found that *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), and *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), controlled Davey's Free Exercise claims. Holding that the state had in no way prohibited Davey from pursuing a theology degree, the court concluded that "while a citizen may not be unduly prohibited from practicing his religion, he may not demand that the government pay for those religious pursuits". App. 68a. The District Court also rejected Davey's claims under the Free Speech Clause and Establishment Clause of the First Amendment, and the Equal Protection Clause of the Fourteenth Amendment. And the District Court rejected Davey's claims under the Washington Constitution.

5. Davey appealed to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit reversed the District Court in a divided opinion. App. 1a. The majority relied primarily on *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), and *McDaniel v. Paty*, 435 U.S. 618

(1978), for the proposition that "a law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny". App. 4a. The majority recognized that the law in this case differed from the ordinance in *Lukumi* because Wash. Rev. Code § 28B.10.814 "neither prohibits religious conduct nor does its application turn on the student's religious motivation". App. 14a. Despite this fact, the majority concluded that the HEC Board's policy discriminated on its face, because the "statute and [the HEC Board's] implementing policy refer on their face to religion" and "exclude[] only those students who declare a major in theology that is taught from a religious perspective". App. 15a. Having concluded that the law discriminates on its face against religion, the majority went on to hold that Washington's interest in upholding its constitutional bar on funding religious instruction was not sufficiently compelling to survive strict scrutiny review. App. 29a.

The HEC Board argued that this case was controlled by legal principle in *Rust v. Sullivan*, 500 U.S. 173 (1991), and *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), that a legislative decision not to fund the exercise of a constitutional right does not infringe on that right. App. 12a. The majority distinguished *Rust* and *Regan* based on *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), which held that a limited public forum, established by the university to facilitate student speech, could not

exclude religious speech. Even though the majority did not base its decision on the Free Speech Clause of the First Amendment, it reasoned that when the Washington Legislature funded the Promise Scholarship program, it created a "fiscal forum" similar to the limited public forum at issue in *Rosenberger*. According to the majority, "the government may limit the scope of a program that it will fund, but once it opens a neutral 'forum' (fiscal or physical), with secular criteria, the benefits may not be denied on account of religion". App. 21a. The majority also distinguished *Rust* and *Regan* on the ground that Washington law was coercive because if Davey "accepts the Scholarship, he may not pursue a degree in theology (whether or not he has non-government funds to do so)". App. 24a.

The dissenting judge began by observing that "[t]his is a funding case, not a free exercise case or a free speech case." App. 33a. The dissent rejected the application of *Lukumi* and *McDaniel* because those cases involved laws that burdened the exercise of constitutional rights. In the dissenting judge's view, the law at issue in *Lukumi* prohibited "the ritualistic slaughter of animals—that constitute a central practice of the Santeria religion". App. 34a. Thus, for church members, "[t]heir choice was to practice their religion upon threat of prosecution." App. 34a. Similarly, *McDaniel* pitted a minister's "constitutional right to seek and hold office as a state citizen against the clergy-disqualification provisions". App. 36a. In contrast to fundamental rights at issue in *Lukumi* and *McDaniel*, the dissent

found that Davey's claim did not involve a "constitutional right to educational funding". App. 37a. According to the dissent, "Washington has neither prohibited nor impaired Davey's free exercise of his religion. He is free to believe and practice his religion without restriction." App. 32a. The only state action was "a decision consonant with the state constitution, not funding 'religious . . . instruction'". App. 32a.

The dissent also concluded that the state's long-standing policy of preventing state interference with religious practice by strictly limiting state involvement in religious instruction could not support the majority's conclusion that the state was aiming to suppress disfavored religious ideas. App. 20a. Finally, the dissent rejected applying *Rosenberger*. In the dissent's view, this is not a free speech case and "the decision not to fund Davey's pursuit of a pastoral ministry degree does not implicate the free speech viewpoint concerns that drove the Court's decision in *Rosenberger*". App. 45a. The dissent pointed out that Northwest College is an eligible institution, even though it is a religious college, and concluded that there was no concern that Washington "has precluded, will preclude, or is even likely to preclude Davey from being exposed to the pervasively Christian perspective that permeates every aspect of his educational experience at Northwest College". App. 46a. Thus, choosing not to fund his theology degree would not limit Davey's exposure to a Christian viewpoint.

In the dissent's view, the controlling legal precedents were *Maher v. Roe*, 432 U.S. 464 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980), which stand for the proposition that government decisions not to underwrite fundamental rights do not abridge those rights. App. 44a. Applying this principle, the dissent concluded that Washington had no obligation to fund Davey's theology degree.

The HEC Board filed a timely petition for rehearing and petition for rehearing en banc, which was denied. App. 86a.

REASONS FOR GRANTING THE PETITION

A. The Ninth Circuit's Decision Directly Conflicts With A Decision Of The Washington Supreme Court

1. The Ninth Circuit's decision conflicts squarely with the Washington Supreme Court's decision in *Witters v. Washington Commission for the Blind*, 112 Wash. 2d 363, 771 P.2d 1119 (1989), *cert. denied sub nom. Witters v. Washington Department of Services for the Blind*, 493 U.S. 850 (1989) (*Witters* III). *Witters* III held that the state did not violate the Free Exercise Clause of the First Amendment when it followed the command of the state constitution and refused to provide public funds for religious instruction. The Ninth Circuit reached exactly the opposite conclusion.

2. The material facts of *Witters* III and the case at bar are identical. Larry Witters applied for vocational rehabilitation funds "to pursue a course of study that would prepare him for a career as a

pastor, missionary or youth director". *Witters* III, 112 Wash. 2d at 365, 771 P.2d at 1120. Witters met the medical and physical eligibility requirements to receive the funds, but the state commission for the blind denied his application because the "Washington State Constitution forbids the use of public funds to assist an individual in the pursuit of a career or degree in theology or related areas". *Id.* at 366, 1120.

Witters challenged the commission's decision. The Washington Supreme Court upheld the denial of funds on the grounds that providing the funds would violate of the Establishment Clause of the First Amendment of the United States Constitution. *Witters v. Washington Comm'n for the Blind*, 102 Wash. 2d 624, 627-30, 689 P.2d 53, 55-57 (1984) (*Witters* I). The court did not reach the state constitutional issue. Witters petitioned for a writ of certiorari, and this Court reversed. *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (*Witters* II). This Court held that providing the funds did not violate the Establishment Clause and remanded the case, noting that on "remand, the state court is of course free to consider the applicability of the 'far stricter' dictates of the Washington State Constitution". *Witters* II, 474 U.S. at 489. The Court expressly "decline[d] petitioner's invitation to leapfrog consideration of those issues by holding that the Free Exercise Clause *requires* Washington to extend vocational rehabilitation aid to petitioner regardless of what the State Constitution commands or further factual

development reveals, and we express no opinion on that matter". *Witters* II, 474 U.S. at 489-90.

On remand in *Witters* III, the Washington Supreme Court held that providing funds to Witters would violate article I, section 11 of the Washington Constitution, which prohibits "the application of public funds to religious instruction". *Witters III*, 112 Wash. 2d at 370, 771 P.2d at 1122. The court also rejected Witters' Free Exercise claim. *Id.* at 372, 1123 ("[T]he Commission's only action was to refuse to pay for his theological education. The Commission's decision may make it financially difficult, or even impossible, for [an] applicant to become a minister, but this is beyond the scope of the free exercise clause. We hold that the Commission's refusal to provide financial assistance did not violate the free exercise clause of the federal constitution.").

The Washington Supreme Court continues to adhere to the principle in *Witters* III that the Washington Constitution prohibits using public funds to pay for religious instruction. In *State ex rel. Gallwey v. Grimm*, 146 Wash. 2d 445, 48 P.3d 274 (2002), the Court discussed *Witters* III with approval and upheld a different student aid program that could be used to attend religious colleges because public funds could not be used to pay for religious instruction. *Gallwey*, 146 Wash. 2d at 468, 48 P.3d at 285 ("The distinction between this case and *Witters* [III] is obvious. Here, the grants are made contingent upon a student's adherence to the EOG Program's religious *exclusion* which provides that no

student will be enrolled in any program that includes religious worship, exercise, or instruction.").

3. The Ninth Circuit declined to follow *Witters* III, even though it recognized the holding of the Washington Supreme Court. App. 26a ("On remand, the Washington Supreme Court held that extending aid would violate the Washington Constitution's prohibition on appropriating and applying public funds to religious instruction, and would not infringe the applicant's right to the free exercise of religion.").

4. The conflict between the Ninth Circuit and the Washington Supreme Court is significant and requires immediate resolution by this Court. First, the result of the conflict between the Ninth Circuit and the Washington Supreme Court is that the proper rule of law to be applied in Washington is unknown. If a challenge to using state funds to pay for religious instruction is brought in state court, there will be one answer—if the same challenge is brought in federal court, there will be a different answer. This is an intolerable situation. When there is a conflict between different circuits or different state courts, the law within each circuit or state is settled; the question on certiorari is the need for national uniformity. In Washington, however, two courts have issued two completely irreconcilable decisions. The conflict between the Ninth Circuit and the Washington Supreme Court imposes a state

of confusion that can only be settled by a decision of this Court.[2]

5. Second, this case involves the validity of a provision of the Washington Constitution—the fundamental source of state law in Washington—not simply a state statute. Article I, section 11 of the Washington Constitution prohibits funding religious instruction and imposes a stricter separation of church and state than the Establishment Clause of the First Amendment of the United States Constitution. This requirement has been a limitation of the exercise of legislative power since 1889, when Washington was admitted to the Union. The Ninth Circuit's holding is nothing less than a declaration that article I, section 11 is unconstitutional under the Free Exercise Clause. App. 30a-31a ("Nor does the establishment clause in Washington's Constitution excuse [the HEC Board's] disabling Davey from receipt of the Promise Scholarship to which he was otherwise entitled under the program's objective criteria solely on account of his personal decision to pursue a degree in theology."). This Court is the appropriate tribunal to decides whether a state constitutional provision runs afoul of the United States Constitution.

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[2] In the past, this Court has granted review to resolve a conflict between a federal court and a state supreme court over the constitutionality of the state's law. *Seling v. Young*, 531 U.S. 250, 260 (2001) ("This Court granted the petition for a writ of certiorari to resolve the conflict between the Ninth Circuit Court of Appeals and the Washington Supreme Court." (citation omitted)).

B. The Conflict Between The Washington Supreme Court And The Court Of Appeals Is Based On The Ninth Circuit's Failure To Properly Apply This Court's Decisions

1. The conflict between the Washington Supreme Court and the Court of Appeals is the result of the Ninth Circuit's failure to properly apply this Court's precedent. The Court has decided a consistent line of cases holding that a legislative decision not to fund the exercise of a constitutional right does not infringe on that right. *Maher v. Roe*, 432 U.S. 464 (1977) (no right to Medicaid funding for medical services incident to constitutionally protected right to nontherapeutic abortions); *Harris v. McRae*, 448 U.S. 297 (1980) (no right to Medicaid funding for medical services incident to constitutionally protected right to medically necessary abortions); *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983) (no right to tax exempt status for nonprofit organizations engaged in First Amendment lobbying activities); *Rust v. Sullivan*, 500 U.S. 173 (1991) (no right to federal funds to engage in First Amendment family planning service related to abortion). A straightforward application of this principle here sustains Washington's constitutional ban on using public funds to pay for religious instruction.

2. Instead of following this well-established precedent, the Ninth Circuit tangled up its analysis with other lines of decisions that do not apply. The Court's free exercise cases deal with laws that

actually impact the practice of religion—as opposed to public funding of the exercise of a religious right. *Sherbert v. Verner*, 374 U.S. 398 (1963) (law requiring Saturday work in violation of religion to obtain unemployment compensation); *McDaniel v. Paty*, 435 U.S. 618 (1978) (law prohibited minister from exercising constitutional right to hold office); *Lyng v. NW Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (logging and road-building in forest used for religious purposes); *Empl. Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990) (law prohibiting use of peyote employed in religious ceremony); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (law prohibiting sacrifice of animals as part of religious ceremony).

Unlike these free exercise cases, Washington's constitutional prohibition against public funding of religious instruction does not impair Davey's free exercise of his religion—he is free to believe and practice his religion without restriction. The Washington Constitution does not even prevent Davey from majoring in theology. He is free to use his scholarship at Northwest College to obtain a degree in Business Management and Administration, while simultaneously pursuing a theology degree at a different college—using his own funds.

3. The Ninth Circuit also tangled up its analysis with this Court's free speech cases that hold if the government establishes a limited public forum for speech, it may not exclude religious speech that falls within the purpose of the forum. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384

(1993) (limited public forum to use school property for social, civic and recreational meetings and entertainment and such other uses pertaining to the welfare of the community could not exclude religious speech); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (limited public forum for speech of university recognized student groups could not exclude religious speech); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (limited public forum for social, civic and recreational meetings and entertainment and such other uses pertaining to the welfare of the community could not exclude religious speech); *Legal Servs. Corp. v. Valazquez*, 531 U.S. 533 (2001) (funding for legal services attorneys to engage in advocacy speech on behalf of private clients could not exclude speech related to welfare reform or a challenge to existing welfare laws).

These cases involving First Amendment speech rights do not apply because the state's decision not to fund Davey's religious instruction does not restrict Davey's free speech rights. He remains free to engage in any religious speech he chooses. Nor does the state interfere with Davey's ability to be exposed to a religious point of view. Northwest College is a religious school with a distinctively Christian point of view. Since Northwest is an eligible institution, Davey could attend Northwest—using his scholarship—and be exposed to that Christian point of view. The only thing he cannot do is use the scholarship to pursue a degree in theology.

4. The urgent conflict between the Washington Supreme Court and the Ninth Circuit requires review. This case also presents a good vehicle to straighten out the tangle the Ninth Circuit has made in the law.

C. The Question Presented Has Significance Beyond The State Of Washington

1. This case also has national significance beyond the intolerable conflict between the Washington Supreme Court and the Ninth Circuit. First, like Washington, nineteen states have constitutions that expressly prohibit using public funds to support religion.[3] For example, the Missouri Constitution prohibits using public funds "to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever". Mo. Const. art. IX, § 8; App. 111a.

2. Also like Washington, state courts have enforced these constitutional funding restrictions to strike down laws that would have been valid under

[3] Cal. Const. art. XVI, § 5; Del. Const. art. X, § 3; Fla. Const. art. I, § 3; Ga. Const. art. I, § 2, ¶ VII; Haw. Const. art. X, § 1; Idaho Const. art. IX, § 5; Ky. Const. § 189; Mass. Const. art. XLVI, Amendments, art. XVIII, § 2; Mo. Const. art IX, § 8; Mont. Const. art. X, § 6; Nev. Const. art. XI, § 10; N.M. Const. art. XII, § 3; N.D. Const. art. VIII, § 5; Okla. Const. art. II, § 5; Or. Const. art. I, § 5; S.D. Const. art. VI, § 3, art. VIII, § 16; Tex. Const. art. I, § 7; Vt. Const. ch. 1, art. III; Wyo. Const. art. I, § 19. The text of these constitutional provisions are set out in the appendix starting at page 107a.

the federal Establishment Clause. For example, this Court has ruled that using public funds to provide text books and bus transportation to students attending religious schools does not violate the Establishment Clause. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (state law authorizing school districts to pay for bus transportation for school children—including those who attended religious schools—did not violate the Establishment Clause); *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968) (state law authorizing the loan of textbooks to students attending private schools—including religious schools—did not violate the Establishment Clause).

But, state courts have struck down similar laws using public funds to pay for loaned textbooks and student transportation based on provisions of their state constitutions, despite the fact there was no federal Establishment Clause violation. In *California Teachers Association v. Riles*, 29 Cal. 3d 794, 632 P.2d 953, 176 Cal. Rptr. 300 (1981), the California Supreme Court struck down a law authorizing loaned textbooks. The court declined to follow *Allen* because it was interpreting the state constitution, not the federal constitution. *Riles*, 29 Cal. 3d at 812, 632 P.2d at 963-64, 176 Cal. Rptr. at 311-12 ("We decline to follow the rationale of *Allen* . . . . In any event, it is not the meaning of the First Amendment which is critical to our determination, but . . . the California Constitution."); *Paster v. Tussey*, 512 S.W.2d 97, 103-04 (Mo. 1974), *cert. denied sub nom. Reynolds v. Paster*, 419 U.S. 1111 (1975) (same, textbooks); *McDaniel v. Sch. Bd. of the*

Yankton Indep. Sch. Dist. 1, 90 S.D. 599, 604-05, 246 N.W.2d 93, 96 (1976) (same, textbooks); *Fannin v. Williams*, 655 S.W.2d 480, 483-84 (Ky. 1983) (same, textbooks); *Dickman v. Sch. Dist. 62C*, 232 Or. 238, 260-61, 366 P.2d 533, 545 (1961), *cert. denied sub nom. Carlson v. Dickman*, 371 U.S. 823 (1962) (same, textbooks); *Opinion of the Justices in Response to Question Propounded by Governor*, 59 Del. 196, 200-01, 216 A.2d 668, 671 (1966) (same, transportation); *Spears v. Honda*, 51 Haw. 1, 15, 449 P.2d 130, 138-39 (1969) (same, transportation); *Bd. of Educ. v. Antone*, 384 P.2d 911, 912-13 (Okla. 1963) (same, transportation).

The implication of the Ninth Circuit's ruling is that state constitutional restrictions against using public funds to support religion violate the Free Exercise Clause of the First Amendment. This result is inconsistent with these state court decisions that apply their specific constitutional prohibitions on the use of public funds.

3. Moreover, there is a substantial tension between the Ninth Circuit's decision and decisions applying state constitutional restrictions on the use of public funds in the face of Free Exercise claims. In *Chittenden Town School District v. Department of Education*, 169 Vt. 310, 738 A.2d 539 (1999), *cert. denied sub nom. Andrews v. Vermont Department of Education*, 528 U.S. 1066 (1999), the court considered a law authorizing school districts to provide a high school education for their students by paying tuition at nonpublic schools selected by their parents. The court held that the program did not

violate the Establishment Clause, but did violate the stricter provisions of the Vermont Constitution, which provides that no person "can be compelled to . . . support any place of worship . . . contrary to the dictates of conscience". *Chittenden*, 169 Vt. at 324, 342-43, 738 A.2d at 549, 562-63. The court went on to reject the claim that the Free Exercise Clause required the state to pay tuition at religious schools. *Id.* at 343-44, 563-64 ("today's ruling requires no one to choose between following the precepts of his or her religion and forfeiting benefits that would otherwise be available from the government" (at 344, 563)). *See also*, *Epeldi v. Engelking*, 94 Idaho 390, 396-97, 488 P.2d 860, 866-67 (1971), *cert. denied*, 406 U.S. 957 (1972) (Free Exercise Clause did not require the state to provide bus transportation to students attending religious schools); *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376, 384-87 (W.D. Mo. 1973), *affirmed*, 419 U.S. 888 (1974) (same).

4. The second reason the Ninth Circuit's decision has national significance is that Washington's prohibition of using public funds to pay for a degree in theology is not a unique restriction. Fourteen other states have exactly the same or similar restrictions in their statutes authorizing financial aid for college students.[4] For example, New

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[4] Ala. Code § 16-33A-1(4)(f) (2002) (an eligible student is "not enrolled and does not intend to enroll in a course of study leading to an undergraduate degree in theology or divinity"); Fla. Stat. Ann. § 240.605(4)(b)(2) (West 2002) ("A person is eligible to receive [a grant] if . . .[h]e or she is not enrolled in a program of study leading to a degree in theology or divinity[.]"); Ky. Rev. Stat. Ann. § 164.753(3)(c) (Banks-Baldwin 2002)

Jersey has exactly the same requirement. N.J. Stat. Ann. § 18A:71B-20(b) (West 2003) ("A student who is

("Restrict scholarships to persons who . . . are not planning to enroll or are not enrolled in a program of study leading to a certificate, diploma or degree in theology, divinity or religious education[.]"); La. Rev. Stat. Ann. § 1675(5) (West 2003) ("A person shall be eligible for consideration for a scholarship if . . . [h]e shall not be a major in religious studies or theology."); Md. Code Ann., Education § 18-104(b)(2) (2002) ("The recipient of a scholarship may not be . . . [r]equired to take sectarian religious courses to qualify for a degree."); Mich. Comp. Laws § 390.994(2) (2003) ("A grant shall not be made under this act to a student who is enrolled in a program of study leading to a degree in theology, divinity, or religious education."); Mo. Ann. Stat. § 173.215(1.6) (West 2002) ("No award shall be made under sections 173.200 to 173.230 to any applicant who is enrolled, or who intends to use the award to enroll, in a course of study leading to a degree in theology or divinity."); N.Y. Educ. Law § 661(6) (McKinney 2003) ("no such awards shall be used to obtain professional instruction in theology"); Ohio Rev. Code Ann. § 3333.27(B) (West 2002) ("No grant shall be made to any student enrolled in a course of study leading to a degree in theology, religion, or other field of preparation for a religious profession unless the course of study leads to an accredited bachelor of arts or bachelor of science degree."); Or. Rev. Stat. § 348.186(3) (2001) ("The Oregon Student Assistance Commission may not award an Oregon Achievement Grant to a qualified student who is enrolled in a course of study required for and leading to a degree in theology, divinity or religious education."); 59 S.C. Code Ann. Regs. § 113-20(e) (2002) (a qualified applicant "is not enrolled in a course of study leading to a degree in theology, divinity, or religious education"); S.D. Codified Laws § 13-55B-1(2) (Michie 2002) ("Qualified student . . . is not enrolled in a course of study leading to a degree in theology or religious education[.]"); Wis. Stat. Ann. § 39.30(2)(d) (West 2003) ("No grant shall be awarded to members of religious orders who are pursuing a course of study leading to a degree in theology, divinity or religious education.").

enrolled in a course leading to a degree in theology or divinity shall not be eligible for a tuition aid grant.").

Thus, the Ninth Circuit's decision is likely to have a wide impact beyond the State of Washington. Given the national scope of this restriction, this Court should grant review to settle the issue.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted.

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February 24, 2003

No. 00-35962

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSHUA DAVEY,

Plaintiff-Appellant,

v.

GARY LOCKE, Gov., individually and in his official capacity; MARCUS S. GASPARD, individually, and in his official capacity as Executive Director of the Higher Education Coordinating Board; BOB CRAVES, individually, and in his official capacity as Chair of the Higher Education Coordinating Board; JOHN KLACIK, individually, and in his official capacity as Associate Director of the Higher Education Coordinating Board,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Washington Barbara J. Rothstein, Chief District Judge, Presiding

Argued and Submitted
May 6, 2002 – Seattle, Washington

Filed July 18, 2002

Before: Pamela Ann Rymer, M. Margaret McKeown, and Ronald M. Gould, Circuit Judges

Opinion by Judge Rymer;
Dissent by Judge McKeown

SUMMARY

Individual Rights/Religious Freedom

The court of appeals reversed a judgment of the district court. The court held that the Washington Higher Education Coordinating Board's (HECB) policy denying a state-funded "Promise Scholarship" to a student otherwise qualified for it according to objective criteria solely because the student decides to pursue a degree in theology from a religious perspective infringes his right to the free exercise of his religion.

In 1999, the state of Washington created the Promise Scholarship for low and middle income students who achieved an excellent academic record throughout their high school careers. To be eligible for the award, a student had to be designated in the top 10% of the 1999 graduating senior class; have a family income that is equal to or less than 135% of the state's median, and, attend an accredited public or private university, college, or other accredited post-secondary institution in the state of Washington.

Appellant Joshua Davey applied for the scholarship and was selected as a recipient in August 1999. In the fall he enrolled at Northwest College, an accredited institution affiliated with the Assembly of God. Students apply to Northwest were required to indicate "a personal commitment to Jesus Christ as Lord and Savior," and the college educated students from a "distinctly Christian" point of view. As he was a Christian who intended to become a cleric, Davey declared a double major in pastoral ministries and business management and administration. A pastoral ministries major at Northwest was designed to prepare students for a career as a Christian minister. Classes were taught from a viewpoint that t' Bible represents truth and was foundational whereas, according to HECB, theology courses at public postsecondary institutions in Washington were taught from an historical and scholarly point of view.

In October 1999, HECB notified financial aid administrators throughout the state that students pursuing a degree in theology were not eligible to receive the Promise Scholarship. Northwest determined that majors in pastoral ministries were pursuing a degree in theology, so it could not certify Davey's eligibility as HECB required. As a result, Davey had to choose whether to follow his calling, or forego the scholarship. He decided to give up the scholarship, but was able to pursue his major.

Davey brought an action in district court against appellees the Governor of Washington and officials of HECB, alleging violations of the religion clauses of the First Amendment and his federal and state constitutional rights. HECB argued that

state funding for Davey's religious instruction was barred by state law, Washington Revised Code § 28B.10.814, and the state constitution's provision regarding the separation of church and state; and that refusing to award aid to students pursuing a degree in theology was reasonably related to the bar in the Washington Constitution. Both parties moved for summary judgment, which the district court granted in HECB's favor.

Davey appealed.

The First Amendment declares: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. Thus, the state may neither favor, nor disfavor, religion. The Free Exercise Clause protects religious observers against unequal treatment. Whereas a law that is neutral and of general applicability need not be justified by a compelling government interest even if it has the incidental effect of burdening a religious practice, a law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commends of the First Amendment, a law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests.

Section 28B.10.814 and HECB's policy on their face discriminated based on religious pursuit. That the effect of the classification was not to underwrite Davey's education because it included a degree in theology did not make the classification less of a discrimination on account of

viewpoint. Davey was denied a Promise Scholarship to which he was otherwise entitled solely because he personally chose to pursue a religious major. For this reason, the restriction had to be strictly scrutinized.

Washington's interest in not appropriating or applying money to religious instruction as mandated by its constitution was less than compelling. The Promise Scholarship was awarded to students; no state money went directly to any sectarian school. Application of the proceeds of the scholarship to religious instruction was remote at best. In these circumstances it was difficult to see how any reasonably objective observer could believe that the state was applying state funds to religious instruction or to support any religious establishment by allowing an otherwise qualified recipient to keep his scholarship.

It had to be held that HECB's policy denying a Promise Scholarship to a student otherwise qualified for it according to objective criteria solely because the student decides to pursue a degree in theology from a religious perspective infringes his right to the free exercise of his religion. Therefore, the criterion that conditioned receipt of the Promise Scholarship on the recipient's not pursuing a degree in theology taught from a religious perspective had to be stricken. HECB could not rely on § 28B.10.814, because its classification based on religion was unconstitutional as applied through HECB's policy to Davey. Nor did the establishment clause in Washington's Constitution excuse HECB's disabling Davey from receipt of the Promise Scholarship to which he was otherwise

entitled under the program's objective criteria solely on account of his personal decision to pursue a degree in theology.

Judge McKeown dissented, writing that this was a funding case, not a free exercise case or a free speech case, and that the Supreme Court's jurisprudence in the abortion funding cases guided the decision here.

COUNSEL

Stuart J. Roth, The American Center for Law and Justice, Mobile, Alabama, and Kevin H. Theriot, The American Center for Law and Justice, Virginia Beach, Virginia, for the plaintiff-appellant.

Michael J. Shinn, Assistant Attorney General, Seattle, Washington, for the defendants-appellees.

OPINION

RYMER, Circuit Judge.

This appeal challenges Washington law that denies a state-funded "Promise Scholarship" to students who are qualified for it by virtue of high school grades, family income, and attendance at an accredited college in the state, solely because the student decides to pursue a degree in theology.

Joshua Davey was awarded the Scholarship but lost it when he declared a major in Pastoral

Ministries at Northwest College. He claims that this was discriminatory and denied him access to funds that were otherwise available to all eligible students in violation of the religion clauses of the First Amendment and his federal and state constitutional rights to freedom of speech and equal protection. Washington's Higher Education Coordinating Board (HECB), which administers the Promise Scholarship, defends its action on the ground that the state did not prohibit Davey from pursuing religious studies but simply declined to fund them; that state funding for Davey's religious instruction is barred by state law, Wash. Rev. Code § 28B.10.814,[1] and the state constitution's provision regarding the separation of church and state;[2] and that refusing to award aid to students pursuing a degree in theology is reasonably related to the bar in the Washington Constitution.

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[1] Wash. Rev. Code § 28B.10.814 provides that "[n]o aid shall be awarded to any student who is pursuing a degree in theology."

[2] Article I, § 11 of the Washington Constitution provides:

> Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment....

We conclude that HECB's policy lacks neutrality on its face. It makes the Promise Scholarship (which is neutral toward religion) available to all students who meet generally applicable criteria, except for those who choose a religious major. As this classification facially discriminates on the basis of religion, it must survive strict scrutiny. We are not persuaded that it does; Washington's interest in avoiding conflict with its own constitutional constraint against applying money to religious instruction is not a compelling reason to withhold scholarship funds for a college education from an eligible student just because he personally decides to pursue a degree in theology. Accordingly, we hold that HECB impermissibly deprived Davey of his scholarship.

I

In 1999, Washington created a new college scholarship program for low and middle income students who achieve an excellent academic record throughout their high school careers. The award is known as a "Promise Scholarship." It is available for the first year of a student's postsecondary education, and may be renewed for one additional year. The Scholarship was worth $1,125 for the year 1999-2000, and $1,542 for 2000-01. Private school students may spend their funds on any education-related expense, including room and board.

The Washington Higher Education Coordinating Board administers the Promise Scholarship. Its overview announcing the program stated:

> To be eligible you must meet these criteria:
>
> 1. Be designated by your high school as in the top 10% of the 1999 graduating senior class.
>
> 2. Have a family income that is equal to or less than 135% of the state's median.
>
> 3. Attend an accredited public or private university, college or other accredited post-secondary institution in the state of Washington.

Davey applied for the Scholarship and was selected as a Washington Promise Scholarship recipient in August 1999. In the fall he enrolled at Northwest College, an accredited institution affiliated with the Assembly of God. Students applying to Northwest are required to indicate "a personal commitment to Jesus Christ as Lord and Savior," and the college educates students from a "distinctly Christian" point of view.

As he is a Christian who intends to become a cleric, Davey declared a double major in Pastoral Ministries and Business Management and Administration. Davey wanted to go to college, and to pursue this major, because of his religious beliefs. A Pastoral Ministries major at Northwest is designed to prepare students for a career as a Christian minister. Classes are taught from a viewpoint that the Bible represents truth and is foundational whereas, according to HECB, theology courses at public postsecondary institutions in

Washington are taught from an historical and scholarly point of view.

On October 12, 1999 HECB notified financial aid administrators throughout the state that students pursuing a degree in theology are not eligible to receive the Washington Promise Scholarship.[3] Northwest determined that majors in Pastoral Ministries are pursuing a degree in theology, so it could not certify Davey's eligibility as HECB required. As a result, Davey had to choose whether to follow his calling, or forego the Scholarship. He decided to give up the Scholarship, but has been able to pursue his major.

Davey brought this action against the Governor and officials of HECB[4] to enjoin HECB

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[3] HECB's policy is codified at Wash. Admin. Code § 250-80- 020(12). It provides:

> 'Eligible student' means a person who: (a) Graduates from a public or private high school located in the state of Washington; and
>
> (b) Is in the top ten percent of his or her 1999 graduating class; or
>
> (c) Is in the top fifteen percent of his or her 2000 graduating class; and
>
> (d) Has a family income less than one hundred thirty-five percent of the state's median; and
>
> (e) Enrolls at least half time in an eligible postsecondary institution in the state of Washington; and
>
> (f) Is not pursuing a degree in theology.

[4] The named defendants are Gary Locke, Governor of the State of Washington; Marcus S. Gaspard, Executive Director of the Higher Education Coordinating Board; Bob

from refusing to award the Scholarship to an otherwise eligible student solely because the student is pursuing a degree in theology, and for damages. He and HECB agreed to escrow Scholarship funds for the 2000-01 school year. Both parties moved for summary judgment, which the district court granted in HECB's favor.

Davey timely appealed.

II

A

The parties analyze the authorities from every possible angle. Their arguments distill to this:

On the one hand, singling Davey out for unfavorable treatment in an otherwise neutral program on account of a religious major violates the free exercise rule of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 113 S. Ct. 2217, 124 L.Ed.2d 472 (1993), as well as the rule of *McDaniel v. Paty*, 435 U.S. 618, 98 S. Ct. 1322, 55 L.Ed.2d 593 (1978), that a state offering a benefit may not impose a disability on the basis of religious status. Thus, Washington's restriction may not stand unless it is narrowly tailored to advance a compelling state interest.

Craves, Chair of the Higher Education Coordinating Board; and John Klacik, Associate Director of the Higher Education Coordinating Board. We refer to them collectively as "HECB."

On the other hand, declining to subsidize the exercise of a constitutional right is permissible under *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L.Ed.2d 233 (1991), and *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 103 S. Ct. 1997, 76 L.Ed.2d 129 (1983). The focus in free exercise inquiries is on what the government prohibits rather than on what the individual can exact. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 108 S. Ct. 1319, 99 L.Ed.2d 534 (1988). Here, Washington simply refuses to underwrite the education of students who pursue a degree in theology, but does not prohibit Davey from freely practicing or pursuing his religious views, speaking about them, or associating with others of like mind. Accordingly, strict scrutiny is inapplicable.

The rejoinder is that *Regan* and *Rust* do not apply because the programs there were set up for the government's own purposes as a speaker. As a speaker, the government may selectively fund a program to encourage activities that it believes are in the public interest. By contrast, the purpose of the Promise Scholarship program is broad: to fund the educational pursuits of outstanding students. For this reason, administration of the Scholarship must be viewpoint neutral under *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 115 S. Ct. 2510, 132 L.Ed.2d 700 (1995). However, it isn't, because state policy excludes only those recipients who pursue the study of theology from a religious perspective.

We recur to basic principles. The First Amendment declares: "Congress shall make no law

respecting an establishment of religion, or prohibiting the free exercise thereof." Thus, the state may neither favor, nor disfavor, religion. A law targeting religious beliefs as such is never permissible. In *McDaniel*, for example, the Court held that a state law that disqualified members of the clergy from being delegates to a constitutional convention violated a minister's right to the free exercise of his religion. 435 U.S. at 629, 98 S. Ct. 1322. As the Supreme Court explained in *Lukumi*, "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." 508 U.S. at 532, 113 S. Ct. 2217.

The Free Exercise Clause "protect[s] religious observers against unequal treatment." *Lukumi*, 508 U.S. at 542, 113 S. Ct. 2217 (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 148, 107 S. Ct. 1046, 94 L.Ed.2d 190 (1987) (Stevens, J., concurring in judgment)). Whereas a law that is neutral and of general applicability need not be justified by a compelling government interest even if it has the incidental effect of burdening a religious practice, a "law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546, 113 S. Ct. 2217 (quoting *McDaniel*, 435 U.S. at 628, 98 S. Ct. 1322, quoting *Wisconsin v. Yoder*, 406

U.S. 205, 215, 92 S. Ct. 1526, 32 L.Ed.2d 15 (1972) (quotation marks omitted)); *Employment Division, Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 888, 110 S. Ct. 1595, 108 L.Ed.2d 876 (1990).

Davey submits that HECB's policy fails *Lukumi's* neutrality test because the policy discriminates on its face by treating those who choose a religious major unequally. HECB does not dispute that Davey declared his major for religious reasons or that doing so is constitutionally protected; rather, in its view, *Lukumi* does not control because unlike the ordinances at issue there, Wash. Rev. Code § 28B.10.814 does not proscribe pursuing a degree in theology or bar only religiously motivated pursuits. The object of the ordinances invalidated in *Lukumi* was suppression of a central practice of Santeria worship, the ritualistic slaughter of animals. As HECB points out, Wash. Rev. Code § 28B.10.814 neither prohibits religious conduct nor does its application turn on the student's religious motivation. In this respect we agree with HECB that the Washington statute differs from the *Lukumi* ordinances.

However, Wash. Rev. Code § 28B.10.814 nevertheless implicates the free exercise interests articulated in *Lukumi*. Both the statute and HECB's implementing policy refer on their face to religion. The Promise Scholarship program is administered so as to disqualify only students who pursue a degree in theology from receiving its benefit; otherwise the Scholarship is available to all secondary school graduates who have high enough grades, low enough income, and attend an

accredited college in the state. And the policy as applied excludes only those students who declare a major in theology that is taught from a religious perspective.

HECB's policy also lacks neutrality for the same reason that Tennessee's disqualification of ministers from public office, invalidated in *McDaniel*, lacked neutrality. "Minister[s] of the Gospel or priest[s] of any denomination" were barred by statute from serving as delegates to the state's constitutional convention. McDaniel, who was an ordained Baptist minister, wanted to be a delegate but the state supreme court held that the state's interest in preventing establishment of religion outweighed the guarantee of the Free Exercise Clause. The United States Supreme Court reversed. It made clear that the right to the free exercise of religion encompasses the right to be a minister, and that the clergy disqualification statute imposed an impermissible disability on the basis of religion because McDaniel could not exercise his right to be a minister and to hold office at the same time. *McDaniel*, 435 U.S. at 626, 98 S. Ct. 1322; *see Lukumi*, 508 U.S. at 533, 113 S. Ct. 2217 (opinion of Kennedy, J.) (citing *McDaniel* as rare case where law discriminates on the basis of religious status); *id.* at 557, 113 S. Ct. 2217 (Scalia, J., concurring) (observing that a law excluding members of religious organization from public benefits lacks neutrality, noting *McDaniel*).

HECB distinguishes *McDaniel* on the footing that McDaniel was prohibited from being a delegate as a result of being a minister, whereas Wash. Rev. Code § 28B.10.814 does not prohibit

Davey from pursuing a degree in theology. But this misses the point of *McDaniel:* A state law may not offer a benefit to all (there, to hold a public position; here, to hold a Promise Scholarship), but exclude some on the basis of religion (there, ministers; here, would-be ministers). Washington's restriction disables students majoring in theology from the benefit of receiving the Scholarship just as Tennessee's classification disabled ministers from the benefit of being a delegate. A minister could not be *both* a minister *and* a delegate in Tennessee any more than Davey can be both a student pursuing a degree in theology and a Promise Scholar in Washington. As the Court explained,

> [u]nder the clergy-disqualification provision, McDaniel cannot exercise both rights simultaneously because the State has conditioned the exercise of one on the surrender of the other. . . . In so doing, Tennessee has encroached upon McDaniel's right to the free exercise of religion. "[T]o condition the availability of benefits [including access to the ballot] upon this appellant's willingness to violate a cardinal principle of [his] religious faith [by surrendering his religiously impelled ministry] effectively penalizes the free exercise of [his] constitutional liberties." *Sherbert v. Verner,* 374 U.S. 398, 406, 83 S. Ct. 1790, 1795, 10 L.Ed.2d 965 (1963).

McDaniel, 435 U.S. at 626, 98 S. Ct. 1322. The same is true here. Even though Davey (like McDaniel) was not forced to forego his religious calling, Davey's eligibility for the Scholarship, like

McDaniel's eligibility for office, was conditioned on giving up his religious pursuit.[5]

HECB asserts that Davey's reliance on *McDaniel* is also inapposite because it presumes a right to state funding for his religious exercise. HECB submits that the state has no obligation to underwrite Davey's pursuit of a religious degree, or to make it less costly, relying primarily on *Regan* and *Rust.* This is undoubtedly true in the abstract. *Regan* and *Rust* stand for the proposition that the government, as speaker or policy-maker, may selectively sponsor or pay for programs that it believes to be in the public interest, without being obliged to fund or encourage an alternative activity.[6] In *Regan,* the Court upheld denial of a tax

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[5] Justice Brennan's concurring opinion expounds both points more broadly than the plurality. As he saw it, a religious classification governing eligibility for office discriminates on the basis of belief as well as status and is "absolutely prohibited." 435 U.S. at 632, 98 S. Ct. 1322 (Brennan, J., concurring). Further, citing *Sherbert,* he wrote that in his view, the "proposition--that the law does not interfere with free exercise because it does not directly prohibit religious activity, but merely conditions eligibility for office on its abandonment-- is also squarely rejected by precedent." *Id.* at 633, 98 S. Ct. 1322.

[6] *See, e.g., Bd. of Regents of the Univ. of Wis. Syst. v. Southworth,* 529 U.S. 217, 120 S. Ct. 1346, 146 L.Ed.2d 193 (2000) (citing *Rust* for the proposition that government may appropriate funds to advocate its own policies); *Legal Servs. Corp. v. Velazquez,* 531 U.S. 533, 541, 121 S. Ct. 1043, 149 L.Ed.2d 63 (2001) (noting that counseling activities of doctors under the federal funding program in *Rust* amounted to government speech); *Downs v. Los Angeles Unified Sch. Dist.,* 228 F.3d 1003, 1013-16 (9th Cir.2000) ("Simply because the government opens its mouth to speak does not give every outside individual or group a First Amendment right to play

exemption (the equivalent of a subsidy) for lobbying activities of non-profit welfare organizations because it reflected a policy decision to subsidize such organizations generally and to give an extra subsidy to those that did not engage in lobbying. In *Rust*, the Court upheld regulations that limited the ability of recipients of federal grants for family-planning services to engage in abortion-related advice and activities. *See also Harris v. McRae*, 448 U.S. 297, 100 S. Ct. 2671, 65 L.Ed.2d 784 (1980) (holding that the government has no affirmative constitutional obligation to ensure that persons have the financial resources to exercise a constitutional right, there of obtaining an abortion). Even so, as the Court states in *Regan*, the government may not deny a benefit to a person because he exercises a constitutional right, 461 U.S. at 545, 103 S. Ct. 1997; and "[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to 'aim [ ] at the suppression of dangerous ideas.' " *Id.* at 548, 103 S. Ct. 1997 (quoting *Cammarano v. United States*, 358 U.S. 498, 513, 79 S. Ct. 524, 3 L.Ed.2d 462 (1959), quoting *Speiser v. Randall*, 357 U.S. 513, 519, 78 S. Ct. 1332, 2 L.Ed.2d 1460 (1958)). This is what makes this case different from *Rust* and *Regan*, as *McDaniel* and *Rosenberger* indicate.

In *Rosenberger*, the University authorized payment of out-side contractors for the printing

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ventriloquist"; government can decide who may speak as its representative); *cf. Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 118 S. Ct. 2168, 141 L.Ed.2d 500 (1998) (upholding competitive grants according to subjective criteria).

costs of student publications through a Student Activities Fund, except that costs of religious activity (in connection with publications otherwise eligible for funding) would not be reimbursed. The Court distinguished this practice from the principle recognized in *Rust* and *Regan*:

> Although acknowledging that the Government is not required to subsidize the exercise of fundamental rights, we reaffirmed the requirement of viewpoint neutrality in the Government's provision of financial benefits by observing that "[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas.'" *Regan* relied on a distinction based on preferential treatment of certain speakers--veterans' organizations--and not a distinction based on the content or messages of those groups' speech. The University's regulation now before us, however, has a speech-based restriction as its sole rationale and operative principle.

Rosenberger, 515 U.S. at 834, 115 S. Ct. 2510 (citations omitted). Thus, a restriction based on religion is aimed at "suppression of dangerous ideas." And "ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts." *Id.* at 830, 115 S. Ct. 2510. Therefore, once the state of Washington decided to provide Promise Scholarships to all students who meet objective criteria, it had to make the financial benefit available on a viewpoint neutral basis.

HECB dismisses *Rosenberger* because the University's program there involved expressive conduct. In its view, Davey's claims do not involve public funds designated for expressive conduct, and Wash. Rev. Code § 28B.10.814 does not aim at the suppression of ideas through refusal to underwrite those ideas. We do not believe *Rosenberger* can be distinguished so readily. While the funding in *Rosenberger* did involve student *publications* (except for religious publications), funding students' *education* (except for students pursuing religious education) is not much different. Expressive conduct, creative inquiry, and the free exchange of ideas are what the educational enterprise is all about. So is pursuing a course of study of one's own choice. As the Court in *Rosenberger* observed, "[f]or the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses." *Id.* at 836, 115 S. Ct. 2510; *cf. Rust*, 500 U.S. at 199-200, 111 S. Ct. 1759 (the university is a traditional sphere of free expression that is fundamental to the functioning of our society). The disfavored viewpoint in *Rosenberger* was religion, as it is here, and the risk from state disapproval of the religious pursuits of its students is the same. In any event, to the extent that *Rosenberger's* rationale turns on the Court's treatment of funds as a limited public forum, the Court subsequently indicated in *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 544, 121

S. Ct. 1043, 149 L.Ed.2d 63 (2001),[7] that limited forum cases such as *Rosenberger*, *Lamb's Chapel v. Ctr. Moriches Union Free School District*, 508 U.S. 384, 113 S. Ct. 2141, 124 L.Ed.2d 352 (1993), and *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 103 S. Ct. 948, 74 L.Ed.2d 794 (1983), are instructive in subsidy cases as well. The bottom line is that the government may limit the scope of a program that it will fund, but once it opens a neutral "forum" (fiscal or physical), with secular criteria, the benefits may not be denied on account of religion. *See also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 121 S. Ct. 2093, 150 L.Ed.2d 151 (2001).

Wash. Rev. Code § 28B.10.814 is viewpoint based, and because its viewpoint is based on religion, it does discriminate against religious ideas. The Promise Scholarship program itself has a neutral purpose and is based on objective criteria. For example, the Washington legislature declared that "it regards the higher education of its qualified domiciliaries to be a public purpose of great importance to the welfare and security of this state and nation," and that "the benefit to the state [from a student financial aid program] in assuring the development of the talents of its qualified domiciliaries will bring tangible benefits to the

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[7] In *Velazquez*, the Court struck down a restriction on use of Legal Services Corporation funds, distinguishing *Rust* on the ground that Congress did not single out a particular idea for suppression because it was dangerous or disfavored, or discriminate against viewpoints on abortion, but rather prohibited Title X doctors from counseling that was outside the scope of the project. 531 U.S. at 541, 121 S. Ct. 1043.

state in the future." Wash. Rev. Code § 28B.10.800 (Notes). The Governor's congratulatory letter to Davey on his selection as a Washington Promise Scholarship recipient states that "[e]ducation is the great equalizer in our society. Regardless of gender, race, ethnicity, or income, a quality education places all of us on a more level playing field." The selection criteria are high school grades, income, and staying in Washington for college; the *de* selection criterion is pursuing a degree in theology. This has nothing to do with the purpose or point of the program. To the extent that the message behind the Promise Scholarship is that doing well in high school pays off, and that going to college in Washington is a good thing, and that developing the talents of promising students is of great importance to the state, it is qualified with the message "unless the student pursues a degree in theology from a religious perspective." This necessarily communicates disfavor, and discriminates in distributing the subsidy in such a way as to suppress a religious point of view.

Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 108 S. Ct. 1319, 99 L.Ed.2d 534 (1988), says nothing to the contrary. HECB particularly relies on language in the opinion emphasizing that "[t]he crucial word in the constitutional text [of the Free Exercise Clause] is 'prohibit': 'For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.' " *Id.* at 451, 108 S. Ct. 1319 (quoting *Sherbert*, 374 U.S. at 412, 83 S. Ct. 1790 (Douglas, J., concurring)). While of course this is what the Clause says, "[w]hat the

First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 77-78, 110 S. Ct. 2729, 111 L.Ed.2d 52 (1990) (citing *Speiser*, 357 U.S. at 526, 78 S. Ct. 1332). More importantly, *Lyng* sheds no light on whether the government may except from a neutral program that benefits all who meet secular criteria only those who will use the benefit for a religious reason. The question in *Lyng* was whether the Free Exercise Clause prohibits the government from permitting timber harvesting in a national forest that had traditionally been used by members of American Indian tribes for religious purposes. The answer is no, essentially because the government's program was neutral and merely had an incidental effect on the tribes' religious experience with no tendency to coerce individuals into acting contrary to their religious beliefs. *Lyng*, 485 U.S. at 450-51, 108 S. Ct. 1319; *see also Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L.Ed.2d 876 (no religious exception to drug law of general applicability); *Bowen v. Roy*, 476 U.S. 693, 106 S. Ct. 2147, 90 L.Ed.2d 735 (1986) (no religious exemption from social security numbers). This is different from being directly disabled from participating in a government program on the basis of religion, a question that was addressed and resolved in *McDaniel* and *Rosenberger*.

It is also the case that here, like *McDaniel* and unlike *Rust*, *Regan* or *Lyng*, the classification *is* coercive. Grantees in the *Rust* line of cases could have their cake and eat it, too; that is, they could accept the grant and use it for the program's

restricted purpose, yet remain free to tap non-government resources for non-favored activities which could then be conducted independently. Davey cannot. If he accepts the Scholarship, he may not pursue a degree in theology (whether or not he has non-government funds to do so). If he pursues a degree in theology, he gets no Scholarship. *Cf. Federal Communications Comm'n v. League of Women Voters of California,* 468 U.S. 364, 104 S. Ct. 3106, 82 L.Ed.2d 278 (1984) (*Regan* not controlling because station subject to limit on editorializing in use of grant funds could not use even private funds to finance editorial activities); *Phan v. Virginia,* 806 F.2d 516, 520 (4th Cir.1986) (Virginia's refusal to fund attendance at an out-of-state religious college did not violate the Free Exercise Clause because the condition did not force Phan to choose between religious study and financial aid as in-state church-affiliated colleges with facilities to accommodate him were available). *See also Peter v. Wedl,* 155 F.3d 992, 996 (8th Cir.1998) (failure to provide spastic quadriplegic student at a religious school with paraprofessional forced choice between foregoing sectarian education or paying for paraprofessional; "[g]overnment discrimination based on religion violates the Free Exercise Clause of the First Amendment").

In sum, Wash. Rev. Code § 28B.10.814 and HECB's policy on their face discriminate based on religious pursuit. That the effect of the classification is not to underwrite Davey's education because it includes a degree in theology does not make the classification less of a discrimination on account of viewpoint. This is not a case where a person claims that denial of a

financial benefit which is not available to others deprives him of his free exercise rights. Davey was denied a Promise Scholarship to which he was otherwise entitled solely because he personally chose to pursue a religious major. For this reason we must strictly scrutinize the restriction. *See McDaniel,* 435 U.S. at 628, 98 S. Ct. 1322; *Lukumi,* 508 U.S. at 546, 113 S. Ct. 2217.

B

HECB contends that even if, contrary to its view, a compelling interest is required, Washington's interest in not violating its own law suffices. In support, it notes that the Washington Supreme Court, and the highest courts of other states, have relied on the establishment clause in their state constitutions to reject claims that a bar on funding religious exercise violates the First Amendment.

In particular, HECB points out that the Washington Supreme Court rejected a free exercise claim quite similar to Davey's in *Witters v. State Comm'n for the Blind (Witters III),* 112 Wash.2d 363, 771 P.2d 1119 (1989) (on remand from *Witters v. Washington Dep't of Servs. for the Blind (Witters II),* 474 U.S. 481, 106 S. Ct. 748, 88 L.Ed.2d 846 (1986)). The *Witters* litigation involved a decision by the Washington Commission for the Blind to deny vocational rehabilitation assistance to a blind person who was studying at a Christian college and seeking to become a pastor. The Commission's decision was based on the Washington constitutional prohibition on use of public funds to assist an individual in the pursuit of a career or

degree in theology. It was upheld by the Washington Supreme Court, *Witters v. State Comm'n for the Blind (Witters I)*, 102 Wash.2d 624, 689 P.2d 53 (1984), but the United States Supreme Court held that extension of aid to finance a person's training at a Christian college did not violate the Establishment Clause of the First Amendment. The Court left it to the state court to consider the dictates of the Washington Constitution, which *Witters I* had characterized as "far stricter" than the federal analogue, and the Court declined to "leapfrog" consideration of those issues by holding that the Free Exercise Clause requires Washington to extend aid regardless of what the state constitution commands. *Witters II*, 474 U.S. at 489. On remand, the Washington Supreme Court held that extending aid would violate the Washington Constitution's prohibition on appropriating and applying public funds to religious instruction, and would not infringe the applicant's right to the free exercise of religion. Davey questions whether this continues to be good law, as the state supreme court has since relied on the dissent in *Witters III* in upholding state funding for religious worship so long as it passes through private hands first. *Malyon v. Pierce County*, 131 Wash.2d 779, 935 P.2d 1272 (1997). However, we assume that the Washington Supreme Court's view of the Washington establishment clause is less accommodating than the United States Supreme Court's view of the federal Establishment Clause. The real issue is whether that interest, no matter how stringently construed, is compelling enough to

outweigh a credible free exercise challenge under the federal Constitution.[8]

Following the Supreme Court's lead in *Widmar v. Vincent*, 454 U.S. 263, 276, 102 S. Ct. 269, 70 L.Ed.2d 440 (1981), we indicated in *Kreisner v. City of San Diego*, 1 F.3d 775, 779 n. 2 (9th Cir.1993), that a state's broader prohibition on governmental establishment of religion is limited by the Free Exercise Clause of the federal constitution. In *Widmar*, the University of Missouri claimed a compelling interest in complying with the establishment provisions of the Missouri Constitution to justify exclusion of a student religious group from use of campus facilities. The Court declined to decide whether a state interest derived from its own constitution could ever outweigh the free speech interests

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[8] Other state cases to which HECB refers are not helpful on this issue. They have to do with state aid to sectarian schools rather than state aid to students who use it to pursue a nonsectarian degree. *See, e.g., California Teachers Ass'n v. Riles*, 29 Cal.3d 794, 176 Cal. Rptr. 300, 632 P.2d 953 (1981) (state program providing books directly to sectarian schools violated California's version of the establishment clause); *Elbe v. Yankton Indep. Sch. Dist.*, 640 F. Supp. 1234 (D.S.D.1986) (aid to sectarian schools deemed contrary to the state constitution); *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127 (Maine 1999) (Maine's policy of excluding religious schools from a tuition program paid directly to the school does violate the Free Exercise Clause); *Epeldi v. Engelking*, 94 Idaho 390, 488 P.2d 860 (1971) (application of funds to school districts prohibited by state's establishment clause); *Bd. of Educ. for Indep. Sch. Dist. No. 52 v. Antone*, 384 P.2d 911 (Okla.1963) (transporting parochial students to Catholic school on public buses violates state constitutional bar on aid for religious education).

protected by the First Amendment, but observed that "the state interest asserted here--in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution--is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well. In this constitutional context, we are unable to recognize the State's interest as sufficiently 'compelling' to justify content-based discrimination against respondents' religious speech." *Widmar*, 454 U.S. at 276, 102 S. Ct. 269. HECB submits that *Widmar* applies only to speech restrictions in an open public forum, but there is little reason to suppose that what fails to justify the violation of one right somehow permits violation of a different right. Indeed, the Court also found that Tennessee's interest in preventing the establishment of religion did not justify that state's restriction on ministers. *McDaniel*, 435 U.S. at 628-29, 98 S. Ct. 1322. *See also Good News Club*, 533 U.S. at 113, 121 S. Ct. 2093 (rejecting federal Establishment Clause defense); *Lamb's Chapel*, 508 U.S. at 395, 113 S. Ct. 2141 (same).

The cases upon which HECB relies do not persuade us otherwise. They indicate that states may rely on their own (or the federal) establishment clause if there is *no* free exercise problem. *See, e.g., Luetkemeyer v. Kaufmann*, 364 F. Supp. 376 (W.D.Mo.1973), *aff'd*, 419 U.S. 888, 95 S. Ct. 167, 42 L.Ed.2d 134 (1974) (mem. opinion) (concluding before *Widmar* that Missouri's interest in the separation of church and state was a compelling state interest that took care of any possible infringement of the Free Exercise Clause); *Strout v. Albanese*, 178 F.3d 57 (1st Cir.1999)

(finding no free exercise violation and indicating that Maine's policy of excluding private sectarian schools from grants paid directly to schools was the sort of imbroglio that the Establishment Clause was meant to avoid); *KDM v. Reedsport Sch. Dist.*, 196 F.3d 1046, 1051 (9th Cir. 1999) (holding in accord with *Strout's* free exercise analysis that school district's accommodation of child with disability did not reflect a purpose to suppress religious conduct).

We have concluded that in this case there *is* a free exercise problem. This leaves us with Washington's indisputably strong interest in not appropriating or applying money to religious instruction as mandated by its constitution, and Davey's interest in a Scholarship to which he was entitled based on the objective criteria the state set for qualification--but from which he was disabled based on his being a theology major. We believe that Washington's interest in this case is less than compelling. The Promise Scholarship is a secular program that rewards superior achievement by high school students who meet objective criteria. It is awarded to students; no state money goes directly to any sectarian school. Scholarship funds would not even go indirectly to sectarian schools or for non- secular study unless an individual recipient were to make the personal choice to major in a subject taught from a religious perspective, and then only to the extent that the proceeds are used for tuition and are somehow allocable to the religious major. *See Zelman v. Simmons-Harris*, --- U.S. ----, 122 S. Ct. 2460, 153 L.Ed.2d 604 (2002) (emphasizing importance of neutrality and individual choice in upholding voucher

program). The proceeds (approximately $1,500 in Davey's year) may be used for any education-related expense, including food and housing; application to religious instruction is remote at best. HECB does not argue otherwise. In these circumstances it is difficult to see how any reasonably objective observer could believe that the state was applying state funds to religious instruction or to support any religious establishment by allowing an otherwise qualified recipient to keep his Scholarship.

We hold that HECB's policy denying a Promise Scholarship to a student otherwise qualified for it according to objective criteria solely because the student decides to pursue a degree in theology from a religious perspective infringes his right to the free exercise of his religion. As the Court recently reiterated, the "guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Good News Club*, 533 U.S. at 114, 121 S. Ct. 2093 (quoting *Rosenberger*, 515 U.S. at 839, 115 S. Ct. 2510).

Therefore, the criterion that conditions receipt of the Promise Scholarship on the recipient's not pursuing a degree in theology taught from a religious perspective must be stricken. HECB may not rely on Wash. Rev. Code § 28B.10.814 because its classification based on religion is unconstitutional as applied through HECB's policy to Davey. Nor does the establishment clause in Washington's Constitution

excuse HECB's disabling Davey from receipt of the Promise Scholarship to which he was otherwise entitled under the program's objective criteria solely on account of his personal decision to pursue a degree in theology.

III

Given this disposition, it is not necessary to reach Davey's claims that HECB's policy abridges other constitutional rights as well. We express no view with respect to any of them except for his argument that HECB's policy violates the Washington Constitution. These issues are waived because Davey failed to argue and brief the *Gunwall*[9] factors. *Buckles v. King County*, 191 F.3d 1127, 1138 (9th Cir.1999).

REVERSED.

McKEOWN, Circuit Judge, dissenting:

The majority suggests that we begin with first principles, and I do as well. The genesis of this controversy is not the Washington statute or its implementing regulations. Instead, we must start where the State of Washington began over a hundred years ago--long before it created the Promise Scholarship--when it defined its vision of

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[9] *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808 (1986) (identifying factors that Washington Supreme Court considers when determining whether state constitutional provisions are more stringent than their federal counterparts).

religious freedom as one completely free of governmental interference, a vision the State explicitly refused to taint by the influx of public monies into religious instruction. Specifically, I refer to that original provision of the state's 1889 constitution which provides that "No money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment." Wash. Const. art. I, § 11.

As for guiding federal principles, I likewise recognize that the First and Fourteenth Amendments circumscribe a state's ability to interfere with an individual's exercise of religion, specifically mandating that a state "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." In the State of Washington's case, it has assiduously avoided violating the first tenet of the Religion Clauses, and in doing so has not overstepped the bounds of the latter. The simple truth is that Washington has neither prohibited nor impaired Davey's free exercise of his religion. He is free to believe and practice his religion without restriction. Nor has the state prohibited Davey from exercising his right to choose among the full gamut of academic pursuits offered by Northwest College. In fact, Davey is still pursuing the same pastoral studies degree today that he claims the state prohibited him from pursuing three years ago. The only state action here was a decision consonant with the state constitution, not funding "religious ... instruction."

Davey, the majority, and I are all in the same boat in one respect--we are struggling with

where to place Davey's case on the spectrum of Supreme Court jurisprudence. In my view, the outcome of the case depends on how the question is framed. I see the question as being whether the State of Washington may constitutionally decline to fund pastoral studies as part of its Promise Scholarship. Likewise, I see the analysis as following the framework of the question. This is a funding case, not a free exercise case or a free speech case. The State of Washington, based on its constitution, made a straightforward decision not to fund a degree in pastoral studies. In other words, in an effort to maintain the separation between church and state, the state decided that it has no obligation to financially support a student to become a minister. Because I conclude, unlike the majority, that the Supreme Court's jurisprudence in the abortion funding cases guides our decision here, I respectfully dissent.

I

Before addressing the funding cases, I must first disagree with Davey that the Supreme Court's free exercise jurisprudence gives us sufficient guidance to warrant a decision in his favor.

Davey relies primarily on the Court's decisions in *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 113 S. Ct. 2217, 124 L.Ed.2d 472 (1993) and *McDaniel v. Paty*, 435 U.S. 618, 98 S. Ct. 1322, 55 L.Ed.2d 593 (1978), to argue that the State's decision not to fund religious activities impermissibly discriminates against him by (1) "singling out" students who would otherwise pursue a theology degree; and (2) forcing them to

make the difficult decision of choosing to accept funding at the expense of foregoing religious study for the first two years of post-secondary education. Those decisions simply do not support this conclusion.

As the majority here acknowledges, *Lukumi* is hardly Davey's case. There, the challenged ordinances were the rare but quintessential example of laws that directly prohibit certain religious practices. In particular, the laws at issue in that case authorized fines and even imprisonment for activities--the ritualistic slaughter of animals--that constitute a central practice of the Santeria religion. Nothing could have more clearly prohibited the church members' religious exercise than these criminal sanctions: Their choice was to practice their religion upon threat of prosecution. In contrast, Davey's decision to pursue a degree in theology carries no such ominous retribution. As a consequence, I do not find any guidance in *Lukumi* beyond the criminal ordinances at issue there as to what might constitute an impermissibly burdensome law prohibiting religious exercise.

As the Court explained in *Lukumi*, "upon even the slight suspicion that proposals for state intervention[in religious exercise] stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." 508 U.S. at 547, 113 S. Ct. 2217. Considering Washington's long-standing practice of prohibiting religious funding as a matter of *encouraging* the unfettered free exercise of religion

and the state's "hands off" approach, we should have no such suspicion of animosity in this case. The mere fact that Wash. Rev. Code § 28B.10.814 "refers on its face to religion" does nothing to satisfy the ultimate free exercise concern in *Lukumi*. Nor does the statute's focus on theology majors help discern whether legislators have impermissibly "devise[d] mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices." *Id.* Rather, on this record, Washington's decision not to fund religious education simply reflects its strong desire, as reflected in its constitution since ratification in 1889, to insulate itself from the appearance of endorsing religion--a concern cut from cloth wholly distinct from the pernicious distrust of the Santeria religion that clothed the city ordinances in *Lukumi*. *Compare id.* at 542, 113 S. Ct. 2217 ("The ordinances had as their object the suppression of religion.").

Neither Davey nor the majority seriously contends that either Section 11 of the Washington State Constitution or Wash. Rev. Code § 28B.10.814 was intended to suppress religion. And, because Davey was still able to pursue his chosen major in the absence of funding, he would be hard- pressed to argue that either of these provisions has the unintended effect of suppressing his religious exercise. Nevertheless, Davey argues, and the majority agrees, that the state's funding scheme imposes an unconstitutional condition upon its acceptance. They cite the Supreme Court's 1978 decision in *McDaniel v. Paty*, 435 U.S. 618, 98 S. Ct. 1322, 55 L.Ed.2d 593 (1978), which in turns finds support in the Court's earlier decision in

Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790, 10 L.Ed.2d 965 (1963). Although the majority extracts from these decisions the general proposition that a state may not offer a benefit to all to the exclusion of others on the basis of religion, neither *McDaniel* nor *Sherbert* supports such a broad prohibition on government action as to encompass its funding decisions for purposes of higher education.

To begin, *McDaniel* presented the Court with something of a unique quandary. Specifically at issue there was a provision of the Tennessee state constitution that ultimately pitted McDaniel's constitutional right to seek and hold office as a state citizen against the clergy-disqualification provisions of the state's constitution. Added on top of this was what the Court characterized as McDaniel's federal constitutional right to be a minister, thus leaving it with a multi-level constitutional dilemma: "McDaniel cannot exercise both[federal and state constitutional] rights simultaneously because the state has conditioned the exercise of one on the surrender of the other. Or, in James Madison's words, the State is 'punishing a religious profession with the privation of a civil right.' " 435 U.S. at 626, 98 S. Ct. 1322 (plurality opinion) (*quoting* 5 WRITINGS OF JAMES MADISON 288 (G. Hunt ed.1904)).

Whatever the merits or reach of the unconstitutional conditions doctrine, it is clear that its invocation in *McDaniel* came about in a situation wholly dissimilar to ours: there, the "privation of a civil right" that McDaniel's religious exercise would engender involved one of the most basic and fundamental democratic rights one could

imagine--the opportunity to directly engage in the political process. Here, on the other hand, Davey's concerns are not so weighty. Unlike *McDaniel*, this case does not juxtapose two fundamental rights. We are not talking about some constitutional right to educational funding (which, incidently, there is not, *see San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35, 93 S. Ct. 1278, 36 L.Ed.2d 16 (1973)); rather, we are talking about the "privation" of a scholarship--one which Davey apparently did not need, although he obviously would have appreciated, to pursue his desired major.

Perhaps most telling about the limited application of the unconstitutional conditions doctrine in the free exercise arena is the failure of Davey or the majority to seek support (except tangentially by means of *McDaniel's* explicit reliance on it)[1] [FN1] from the Court's decision in *Sherbert*. It becomes clearer upon inspection why Davey relies on this case only in passing. Specifically, *Sherbert* makes explicit that which the fractured decision in *McDaniel* only opaquely acknowledges by means of its unique facts: the unconstitutional conditions doctrine only arises in the free exercise context when the government benefit would impose a substantial burden on the potential recipient. *Sherbert*, 374 U.S. at 403-404, 83 S. Ct. 1790. No less than with *McDaniel*, a

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[1] In *McDaniel*, there was no opinion of the Court; however, a majority of Justices did agree that the rationale of *Sherbert* controlled its decision. *See* 435 U.S. at 626, 98 S. Ct. 1322 (opinion of Burger, C.J., joined by Powell, Rehnquist, and Stevens, JJ.); *id* at 633, 98 S. Ct. 1322 (opinion of Brennan, J., joined by Marshall, J.).

comparison of the facts in *Sherbert* with those here demonstrate how far Davey's case comes from falling within the scope of this doctrine.

In *Sherbert*, the Free Exercise Clause was not pitted against any sort of constitutional right; rather, at issue were unemployment compensation "benefits." The important distinction in *Sherbert*, however--which may prove to be the reason Davey does not press it here--is not what appears to be the Court's recent attempts to cabin its significance somewhere on the musty shelves of history, *see Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 884, 110 S. Ct. 1595, 108 L.Ed.2d 876 (1990) (declining "to breathe into *Sherbert* some life beyond the unemployment compensation field"), but instead the nature of the choice that Sherbert had to make.

"Under the *Sherbert* test," only "governmental actions that *substantially burden* a religious practice must be justified by a compelling governmental interest." *Smith*, 494 U.S. at 883, 110 S. Ct. 1595 (citing *Sherbert*, 374 U.S. at 402-03, 83 S. Ct. 1790) (emphasis added). Thus, in *Sherbert*, the Court concluded that the petitioner would shoulder a burden of unconstitutional proportions if her receipt of unemployment compensation was conditioned on working during "the Sabbath Day of her faith": "[T]o condition the availability of benefits upon [Sherbert's] willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." 374 U.S. at 399, 406, 83 S. Ct. 1790.

In other words, to receive the benefits to which she would otherwise be entitled, Sherbert was required to engage indefinitely in an activity that was repugnant to her faith. Again, this is hardly Davey's case--either factually or hypothetically. As a matter of fact, Davey has sustained no substantial burden; he continues to pursue his double major in Pastoral Studies and Business Management.

This brings me to a final point of distinction that may be less than explicit in the *Sherbert* decision, but should not be ignored, particularly since the Court after *Sherbert* seems to have limited its reach to the unemployment context (*McDaniel's* uniquely burdensome situation not withstanding): Sherbert not only faced a substantial burden to her religious convictions had she accepted the unemployment benefits, but she also would have potentially suffered an even worse fate had she not. After being fired from her job because of her religious convictions, Sherbert was still unable to find *any* employment for the same reason. Without the state's help, she was unable to help herself. When we consider Davey's own testimony that his decision to forego the scholarship merely led him to finding *available* after-school work to make up the difference, I cannot conclude that he faced a "substantial burden," whatever his ultimate choice.[2]

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[2] Even as described by Davey, the actual burden is indeed small. Based on his declaration, Davey would have to work only a few extra hours a week at his present job. Davey Declaration ¶ 35-37.

II

Perhaps sensing the infirm footing these free exercise cases provide, Davey reaches across the First Amendment divide, leading the majority to find support for the expansive vitality of the unconstitutional conditions doctrine in cases addressing the abridgment of speech. But, as long as we are looking beyond the free exercise arena, we should first recognize the indistinguishable similarity between this case and those that address the abortion funding cases, which conclude that the denial of funding does not "unduly burden" a woman's entitlement to have an abortion.

In my view, the abortion funding cases provide the closest analog to Davey's case. Davey has a constitutionally-protected right to exercise his religious beliefs, including a decision to be a pastoral studies major, but the state has no obligation to fund that religious pursuit, even when it has chosen to fund other educational pursuits. Likewise, a woman has a constitutionally-protected right to an abortion, but the state has no obligation to fund that right, even when it has chosen to fund other medical procedures. This result in the case of abortion is incredibly harsh, particularly for a woman who is indigent and effectively has no choice in terms of exercise of her constitutional right. Davey's case presents no parallel dilemma. The state's decision not to fund religious education does not deprive Davey of his chosen profession or his ability to practice his religion without restriction. But, if Davey is right, then perhaps he will pave the way for reconsideration of the abortion funding paradox.

"The crucial word in the constitutional text is 'prohibit': 'For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.' " *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451, 108 S. Ct. 1319, 99 L.Ed.2d 534 (1988) (*quoting Sherbert*, 374 U.S. at 412, 83 S. Ct. 1790 (Douglas, J., concurring)). Therefore, whether we are talking about government action that directly affects religious free exercise or does so only indirectly, the relevant inquiry must focus upon the nature of the government action and, in particular, whether it "substantially burden[s] a religious practice." *Smith*, 494 U.S. at 883, 110 S. Ct. 1595.

Much as the government may not "prohibit" or otherwise "substantially burden" the free exercise of religion without violating the Constitution, the Court has similarly characterized the right to abortion when it held that the Constitution "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." *Maher v. Roe*, 432 U.S. 464, 473-74, 97 S. Ct. 2376, 53 L.Ed.2d 484 (1977).

Significantly, for purposes of comparison to our case, the Court has held that the express denial of funding by a state for abortions does not so burden that right--even when the individual is indigent or otherwise qualified for medical benefits:

> The [state regulation prohibiting abortion funding] places no obstacles absolute or

otherwise in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of [the state's] decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. *The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there.* The indigency that may make it difficult and in some cases, perhaps, impossible for some women to have abortions is neither created nor in any way affected by the [state's] regulation.

Id. at 474, 97 S. Ct. 2376 (emphasis added); *see also Harris v. McRae*, 448 U.S. 297, 316, 100 S. Ct. 2671, 65 L.Ed.2d 784 (1980) (no unconstitutional burden even when woman would terminate pregnancy for health reasons). I can discern no difference here. In Davey's case, the State of Washington may have made the pursuit of a non-theology degree more attractive by virtue of the scholarship award, but at the same time has not "burdened" Davey by making the pursuit of his chosen degree any more difficult than it would have been in the absence of this funding. Consequently, no less than "the constitutional freedom recognized in [*Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L.Ed.2d 147 (1973),] and its progeny," the freedom to exercise one's religion should not "prevent [Washington] from making a value judgment favoring [the funding of non-theology degrees] over [theology degrees], and ... implement[ing] that

judgment by the allocation of public funds." *Harris*, 448 U.S. at 314, 100 S. Ct. 2671 (internal quotation marks and citations omitted).

Whether these abortion cases will maintain their vitality over time, they represent an inescapable conclusion as to the lack of a burdensome effect of funding decisions, a conclusion that should have even more purchase in the context of the Religion Clauses. I say this because the Court's decisions in the abortion cases, and particularly in *Maher*, which addressed the funding decisions of state legislatures, appear to rest upon a sensitivity to the difficult policy choices states must make between competing and significant interests:

> There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader.

Maher, 432 U.S. at 475, 97 S. Ct. 2376. Thus, in the context of medical welfare, the Court was even willing to endorse the legislature's decision to *encourage* benefit recipients to choose childbirth *over* abortion by effectively making it the less expensive and more readily available alternative for indigent women. Of course, in Davey's case, we need not even conclude that the state was attempting to influence such a controversial choice

if we uphold Washington's decision not to have its taxpayers' dollars used for religious purposes.

Unlike the abortion cases, there is no suggestion here that the State of Washington is actively attempting to encourage--as a matter of public policy or otherwise--Davey or others like him to pursue a purely secular education. Indeed, the scholarship may be used at a religious college. Instead, the indisputable driving force behind § 28B.10.814 and Section 11 of the Washington State Constitution is the state's strong prophylactic interest in steering clear of endorsing or supporting religion through direct funding of religious pursuits--regardless of the various religious paths its citizens may freely choose to pursue on their own. Certainly if the Court is willing to conclude that funding decisions do not impose a substantial burden even when they represent a legislature's desire to encourage one choice over another, we must conclude that they do not impose such a burden when, as here, the state's allocation of resources is guided by a wholly separate concern than a preference of which choice the recipient makes.

III

As I have noted, Davey and the majority take a decidedly different tack as they race around the free exercise jurisprudence to the seemingly safe harbors of *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 115 S. Ct. 2510, 132 L.Ed.2d 700 (1995), and the free speech cases. Whatever nirvana the expansive public forum doctrine may seem to provide, it cannot be

stretched to cover Davey's claims. As attractive as *Rosenberger* may be insofar as it involves funding decisions in an educational setting, Davey's is not a free speech case, or at least has not been treated (and in my view, correctly so) as such by the majority. More explicitly, the decision not to fund Davey's pursuit of a pastoral ministry degree does not implicate the free speech viewpoint concerns that drove the Court's decision in *Rosenberger*.

The underlying rationale for the general prohibition on content discrimination is the concern that it "raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116, 112 S. Ct. 501, 116 L.Ed.2d 476 (1991). Thus, the argument can at least be made, as it was in *Rosenberger*, that the failure to fund a religious publication might impermissibly limit students' access to a full panoply of intellectual perspectives, an important concern in the university setting. *See Rosenberger*, 515 U.S. at 835, 115 S. Ct. 2510 (danger is "chilling of individual thought and expression" which "is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition"). But to extend this argument to the failure to fund Davey's pursuit of a theology degree would stretch the viewpoint rationale to the breaking point of credulity.

Whereas the funding decision in *Rosenberger* directly affected the vehicle of a viewpoint's dissemination, i.e., an actual publication, there can

be absolutely no concern here that the State of Washington has precluded, will preclude, or is even likely to preclude Davey from being exposed to the pervasively Christian perspective that permeates every aspect of his educational experience at Northwest College. In particular, Washington has done nothing to impede Northwest from disseminating its decidedly religious viewpoint.

Whether Davey chooses to pursue a theology degree or a business management degree or any other degree, he will undoubtedly be exposed to a "concept of education" and a viewpoint that Northwest itself describes as "distinctively Christian in the evangelical sense." Northwest College Mission Statement, http://www.nwcollege.edu/about/mission.html (as submitted in Davey's excerpts of record and viewed on June 15, 2000). Whether or not Davey studies to be a minister, he will participate in an educational experience at an institution whose mission "is to provide, in a distinctly evangelical Christian environment, quality education to prepare students for service and leadership." *Id.* And no matter what degree Davey pursues, Northwest assures him that his educational experience will "develop the whole person through general studies integrated with biblical knowledge." *Id.* To make no mistake about it, Northwest ensures its students that it

> seeks to relate biblical Christianity to every area of life, both on and off campus: to academic disciplines, to co- and extracurricular activities, in the residence halls, in the local community, and in one's

> personal life. It assumes that all members of the Northwest community desire meaningful involvement in the process of Christian higher education as they seek to express their faith in the context of an Assemblies of God college. Faculty and staff members commit themselves to be facilitators and learners in this educational endeavor. Students, by enrolling, join with them in accepting the responsibilities of membership in this community.

Id.

No aspect of Washington's scholarship program chills Davey's "individual thought and expression." *Rosenberger*, 515 U.S. at 835, 115 S. Ct. 2510. The State of Washington has simply decided not to fund Davey's training as a minister, and in no way can this decision be perceived as one that might "effectively drive certain ideas or viewpoints from the marketplace," particularly from Northwest's uniquely Christian "marketplace." In sum, the viewpoint concerns raised in *Rosenberger* are simply unfounded in this case.

To the extent that Davey's case is, nevertheless, "not much different" from the speech cases, majority op. *supra* at 756, it cannot be because it presents the same sort of speech concerns implicated in *Rosenberger*. Rather, it must be because the refusal to fund Davey's religious studies somehow imposes a wholly distinct burden on his free exercise right; in other words, it returns us back to Davey's initial

complaint that the State has unconstitutionally conditioned the receipt of its benefits, which leads me to reiterate that Davey is free to use his scholarship at a religious institution. He is absolutely free to discuss religion and study it for purposes of becoming a minister. He suffers no disadvantage as a consequence of the State's decision to fund other educational pursuits. Davey is just as reliant on private sources of aid for his education as he was before he applied for the scholarship funds.

Nonetheless, the majority concludes that Washington has prohibited Davey's free exercise of religion, or more accurately that the State has attempted to suppress "dangerous ideas," maj. op. *supra* at 755, despite the clear and consistent message in its constitution that the citizens of Washington are more concerned about the potentially dangerous distortion that the state funding of religious activities might create, not the suppression of ideas, dangerous or otherwise. Nothing in this statutory scheme implicates Davey's ability to express his beliefs. If such is the result of a decision to fund certain activities to the exclusion of others (that is, if funding decisions somehow coerce an individual's free exercise of religion), then I cannot see how the rationale of the abortion funding cases can survive. As expressed by the Supreme Court, the freedom to exercise the choice of religion cannot be distinguished from the freedom to exercise the choice between childbirth and abortion. Therefore, if the "bottom line," as the majority suggests is that the funding/forum distinction does not end at the frontier of free speech and concerns about viewpoint

discrimination, maj. op. *supra* at 756, then it must at least reach to the abortion context where that right has been characterized in exactly the same fashion as that concerning the free exercise of religion.

IV

In the Court's most recent pronouncement in the religion arena, *Zelman v. Simmons-Harris*, --- U.S. ----, 122 S. Ct. 2460, 153 L.Ed.2d 604 (2002), Justice Thomas specially concurred to express his opinion that "state action should be evaluated on different terms [in the context of the Establishment Clause] than similar action by the Federal Government," concluding that federal courts should "strike a proper balance between the demands of the Fourteenth Amendment on the one hand and the federalism prerogatives of States on the other." *Id.*, 122 S. Ct. at 2481 (Thomas, J., concurring). Concededly, Justice Thomas was suggesting that states should be allowed more constitutional freedom to experiment with involvement in religion, *id.*, but I cannot conclude that such federalism concerns should represent a one-way street when it comes time for a state to decide whether to enter into the ill-defined terrain of the Establishment Clause's jurisprudence.

No less than the State of Ohio's decision to fund students' sectarian education, which the Court endorsed in *Zelman*, the State of Washington's decision not to "experiment" in the funding of religious indoctrination should represent an equally valid concern--both as a matter of federalism and with respect to the more explicit

limitations of the Religion Clauses. Thus, in the absence of a more substantial burden than this decision has placed on Davey's choice of study, I conclude that Washington has successfully navigated the tensions between the free exercise of religion and the prohibition of its endorsement when, at the time of statehood, it decided to refrain from funding religious instruction. I therefore respectfully dissent.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

OCT 26 2000
AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRIT OF
WASHINGTON
BY DEPUTY

JOSHUA DAVEY,

Plaintiff,

v.

GOVERNOR GARY LOCKE, individually and in his official capacity, et al.,

Defendants.

No. C00-61R

ORDER

THIS MATTER comes before the court on Joshua Davey's challenge to the decision of defendants Gary Locke, Governor of Washington, Marcus Gaspard, Executive Director of the Higher Education Coordinating Board, Bob Craves, Chair of the Higher Education Coordinating Board, and John Klacik, Associate Director of the Higher Education Coordinating Board (hereinafter collectively referred to as "HECB" unless individually identified),

preventing him from using state scholarship funds to pursue religious instruction. Both parties have moved for summary judgment on Davey's claims that HECB's decision violated the state and federal constitutions. Having reviewed the pleadings filed in support of and in opposition to the motions, together with the relevant files, and being fully advised, the court finds and rules as follows:

I. BACKGROUND

The succeeding undisputed facts were originally reported in the court's order on Davey's motion for preliminary injunction. In 1999, Governor Gary Locke created the Washington Promise Scholarship to facilitate college attendance by low to middle income students from Washington who ranked among the top 10% of their high school class. The Scholarship's value depends on the level

of funding and the number of qualifying applicants. For the 1999-2000 school year, the Scholarship was worth $1,125. Under the terms of the Scholarship, students must enroll in an accredited four-year institution in order to be eligible. The Scholarship funds are sent directly to the qualifying student's school and held in his or her name. The student's institution must certify that the student is enrolled and eligible for aid before any funds may be released. All funds are to be put towards the student's educational expenses.

In 1999, Davey applied for and was awarded the Scholarship. He received a letter confirming his eligibility from defendant Gaspard in August of 1999, and an award certificate and congratulatory letter from Governor Locke in October of 1999. Davey proceeded to enroll in the Northwest College

("Northwest"), a "Christian community of faith and learning" located in Kirkland, Washington, and declared a double major in Pastoral Ministries and Business Management.

Later in October of 1999, Northwest's financial aid director, Lana Walters, received a memorandum from defendant Klacik informing her that, pursuant to RCW 28B.10.814 and the state constitution, "students who are pursuing degrees in theology are not eligible to receive *any* state-funded student financial aid, including the new Washington Promise Scholarship." Davey Decl. in Support of Motion for Preliminary Injunction, Exh. H (emphasis in original). That memorandum was accompanied by the certification form required from Northwest prior to release of funds to Davey. That certification itself required Northwest to affirm that "no student

[receiving the Scholarship] is pursuing a degree in theology."

Davey was informed of this policy and that, if he pursued a degree in theology, the Scholarship would not be available to him. He adhered to his decision to pursue his chosen career. As a result, no Scholarship funds have been released to him.

Davey initially sought a preliminary injunction from this court ordering HECB to reinstate his Scholarship. The court denied that request by order dated March 17, 2000. Davey now moves for summary judgment on his claims that Washington state's statutory and constitutional prohibitions on the use of state funds for religious instruction violate rights secured by the First and Fourteenth Amendments to the U.S. Constitution, and Article 1, §§11 and 5 of the state constitution.

HECB has moved for summary judgment dismissing each of these claims.

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The parties agree that there are no disputed issues of material fact, and that this matter is appropriate for resolution by summary judgment. Based on a careful review of the record and applicable authority, the court finds that HECB is entitled to judgment as a matter of law and to dismissal of each of the claims in Davey's complaint.

B. Washington State Constitution

1. Article 1, section 11

Davey claims that denying him scholarship funds because he intends to pursue a degree in theology violates the right to free exercise of religion guaranteed by Article 1, §11 of the Washington State Constitution. HECB claims that this very constitutional provision prevents awarding him a scholarship for that purpose.[1]

Article 1, §11 provides that

> Absolute freedom of conscience in all matters of religious sentiment, belief and worship shall be guaranteed to every individual, and no one shall be molested or disturbed in person or

[1] HECB also correctly argues that RCW 28B.10.814 prevents the aid at issue. RCW 28B.10.814 provides that "[n]o state aid shall be awarded to any student pursuing a degree in theology." Davey does not dispute that this statute expressly applies to his case, but claims that the state statutes must bow to the requirements of the Washington State and United States Constitutions. The validity of RCW 28B.10.814 is thus implicitly addressed in the court's discussion of the applicable state and federal constitutional provisions. *See infra*, §§II.B and C. It suffices to say here that the statute passes muster if there has been no violation of Davey's state or federal constitutional rights.

> property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.

Wash. const. Art. 1, §11 (1889). Davey relies on the freedom of conscience portion of §11 to argue that HECB must allow him to use Promise Scholarship funds to pursue religious instruction as an expression of his beliefs. HECB, in turn, relies on the constitutional prohibition on the expenditure of public money for religious purposes to justify its decision.

The Washington State Supreme Court was presented with facts substantially similar to the instant case in *Witters v. State Comm'n for the Blind*, 102 Wash.2d 624 (1984), *rev'd and remanded sub nom., Witters v. Washington Dept. of Services for the*

Blind, 474 U.S. 481 (1986) ("*Witters I*"). Plaintiff Witters was a visually impaired student who applied for aid under a state vocational rehabilitation program in order to attend a private bible college. Witters' ultimate goal was to become a pastor, missionary, or church youth counselor. The Commission for the Blind denied his request based on its policy, which relied on the state constitution, that forbids the use of public funds "in the pursuit of a career or degree in theology or related areas." Witters claimed that his chosen course of study was religiously compelled, and he appealed from that administrative decision on First Amendment grounds. The case eventually reached the state supreme court, which determined that state aid for such religious training was constitutionally prohibited under the First Amendment's

Establishment Clause. *Witters I*, 102 Wash.2d at 630. On certiorari, the United States Supreme Court applied the test announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and held that the aid to Witters would not run afoul of the Establishment Clause. *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481, 489 (1986) ("*Witters II*"). The Court remanded the case, however, to allow the state supreme court to further analyze the state constitution and to decide whether Washington's "far stricter" establishment clause prevented the aid sought. *Id.* (declining Witters' "invitation to leapfrog consideration [of Washington's Constitution] by holding that the Free Exercise Clause *requires* Washington to extend vocation rehabilitation aid to petitioner regardless of what the State Constitution commands") (emphasis in original).

On remand, the state supreme court held that aid to Witters was indeed prohibited by the state constitution. The court interpreted Article 1, §11 to "prohibit[ ] the taxpayers from being put in the position of paying for the religious instruction of aspirants to the clergy with whose religious views they may disagree." *Witters v. State Comm'n for the Blind*, 112 Wash.2d 363, 365, *cert. denied*, 493 U.S. 850 (1989) ("*Witters III*"). Although the United States Supreme Court had held that the aid was permissible under the Establishment Clause, the *Witters III* court observed that there is a "major difference" between the state and federal constitutions. *Id.* at 370. That major difference lay in the fact that the state's establishment clause was more restrictive on governmental funding than the

federal provision. The court, therefore, affirmed the Commission's decision.

Although the state supreme court's interpretation of the federal Establishment Clause was reversed, its interpretation of its own constitution remains intact. The Supreme Court intimated that Washington's constitution may be a more stringent barrier to state funding of religious education. The Court also declined to review the *Witters III* decision after remand. *Witters III*, 493 U.S. 850. Because the Washington Constitution prohibits the funding of religious instruction, both by its express terms and as interpreted by the state's highest court, HECB is entitled to judgment as a matter of law on Davey's Article 1, §11 claims. *See also Calvary Bible Presbyterian Church v. Board of Regents*, 72 Wash.2d 912 (1967) ("There can be no

doubt that our constitutional bars are absolute against [state funding of] religious instruction and indoctrination in specific religious beliefs or dogma . . . i.e., instruction that is devotional in nature and designed to induce faith and belief in the student.").

Nevertheless, Davey has argued extensively that the *Witters* line of cases was implicitly overruled in *Maylon v. Pierce County*, 131 Wash.2d 779 (1997). In *Maylon*, the Washington Supreme Court rejected an Establishment Clause challenge to the Pierce County Sheriffs Department chaplaincy program. The volunteer chaplains were provided by a sectarian organization, but generally provided secular counseling and support services to officers and to the community. The *Maylon* court concluded that Pierce County's decision to underwrite the unpaid chaplains' services by providing radios,

insignia, and use of county vehicles did not run afoul of the Establishment Clause or the Washington Constitution. However, *Maylon* involved a situation where no taxpayer money was being appropriated for religious purposes. Unlike *Maylon*, in this case roughly $1,125 of taxpayer money would be explicitly devoted each year to Davey's religious instruction. Although Davey characterizes this as a "lame" distinction, this court notes that the *Maylon* court found this distinguishing fact to be "the singularly most important undisputed fact of all." *Id.* at 786.

2. Article 1, section 5

Davey alleges that the state's refusal to allow him to apply the Promise Scholarship towards religious education violates the free speech clause of the Washington Constitution. Article 1, §5 of the Washington State Constitution provides that "[e]very

person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." Noting that this constitutional provision requires viewpoint neutrality in any speech regulation, Davey attempts to cast HECB's funding decision as a time, place or manner restriction on his expression, and claims that HECB's policy is facially over broad and discriminates on the basis of viewpoint.

Davey's free speech analysis is fundamentally flawed. He fails to identify the speech or expressive conduct being regulated – nor could he do so. Neither the HECB policy nor RCW 28B.10.814 regulate speech. In spite of HECB's decision, Davey can still speak freely – he just cannot demand that Washington pay for him to do so. The court finds that HECB's policy, which is based on RCW

28B.10.814, does not represent a restriction on speech that implicates Article 1, §5 of the state constitution.

C. United States Constitution

1. First Amendment Free Exercise of Religion Clause

Davey claims that HECB's decision to deny educational funding infringed on his right to freely exercise his religion by limiting his ability to pursue a career in the ministry. HECB argues that they are not preventing Davey from pursuing his religious aspirations, but simply refusing to fund those pursuits.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const., amend. I. "The crucial word in the constitutional text is 'prohibit:' '[f]or the Free

Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.'" *Lyng v. Northwest Indian Cemetery Prot. Assoc.*, 485 U.S. 439, 451 (1988) (denying Native American tribes' claim that decision to harvest timber and build roads on federal land, traditionally used by tribes for sacred religious rituals, amounted to Free Exercise violation) (quoting *Sherbert v. Verner*, 374 U.S. 398, 412 (1963)). *See also Regan v. Taxation with Representation*, 461 U.S. 540, 549 (1983) (holding "that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny").[2]

[2] Davey claims that this reasoning from *Regan* does not apply in light of *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995). That case centrally involved students' free speech rights in a public forum and, being wholly distinguishable on its factual and legal contexts, is not controlling of the instant case. *See infra*, §II.C.3.

Thus, while a citizen may not be unduly prohibited from practicing his religion, he may not demand that the government pay for those religious pursuits.

There is no dispute that HECB has not prohibited Davey from studying pastoral ministries. Davey claims that the distinction between prohibiting conduct and refusing funding was rejected by the Supreme Court in *Sherbert v. Verner*, 374 U.S. 398 (1963), and points to Justice Douglas' *Sherbert* concurrence, quoted in *Lyng*, *supra*, which stated that those "considerations . . . are not relevant here. If appellant is otherwise qualified for unemployment benefits, payments will be made to her not as a Seventh-Day Adventist, but as an unemployed worker. Conceivably these payments will indirectly benefit her church, but no more so

than does the salary of any public employee." *Sherbert*, 374 U.S. at 412-13.

Davey's attempt to bring this case under the *Sherbert* line of cases fails for two reasons. First, the *Lyng* majority relied only on Justice Douglas' observation that the crux of the Free Exercise Clause is governmental prohibition of religious activity. *Lyng*, 485 U.S. at 451. It was the truncated version of Justice Douglas' concurrence quoted in *Lyng*, and on which HECB relies, that was adopted by a majority of the Supreme Court.

Moreover, the Supreme Court has recognized the limitations of *Sherbert* and its progeny, and consistently refused to apply those holdings outside of the unemployment compensation arena. *See Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 884 (1990) (limiting *Sherbert*

and succeeding cases to "stand for the proposition that where the State has in place a system of individual [hardship] exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason"). *Smith* involved two members of the Native American Church who were terminated by their employer for consuming peyote, a controlled substance, in the course of their religious exercises. Both applied for, and were denied, unemployment benefits from the Oregon Department of Human Resources on the grounds that they were terminated for work-related misconduct. Refusing to apply the *Sherbert* line of cases, the *Smith* court rejected petitioners' argument that the Free Exercise Clause prevented enforcement of Oregon's criminal restriction of peyote, and held that religion-based conduct is *not* entitled to a Free Exercise exception to

generally applicable regulations. Indeed, the *Smith* Court determined that the compelling interest test formerly common in First Amendment jurisprudence would only be applied in *Sherbert's* limited factual context. *Id.* at 883-85.

Neither does Davey's heavy reliance on *McDaniel v. Paty*, 435 U.S. 618 (1978), advance his claim. In *McDaniel*, the Supreme Court struck down a portion of the Tennessee Constitution that prevented "ministers of the Gospel or priest of any denomination" from serving as delegates to the state's constitutional convention. Relying on *Sherbert*, 374 U.S. 398, the *McDaniel* Court held that Tennessee could not condition the petitioner's right to the free exercise of his religion on the surrender of his right to seek office. *McDaniel*, 435 U.S. at 626. Like each of his other constitutional arguments,

Davey's reliance on *McDaniel* mistakenly presumes that he has a right to have Washington fund his religious instruction. He does not, and *McDaniel* in no way leads to the opposite conclusion.

2. First Amendment Establishment of Religion Clause

Davey claims that he was denied educational aid in violation of the Establishment Clause of the First Amendment. He relies on *Agostini v. Felton*, 521 U.S. 203 (1997), for the proposition that the state policy against his use of Scholarship funds for religious education has the effect of inhibiting religion, and that this violates the Constitution's Establishment Clause. Citing *Bagley v. Raymond Sch. Dept.*, 728 A.2d 127 (Maine, 1999), *cert. denied*, 120 S. Ct. 364 (1999), HECB argues that the Establishment Clause is only directed at governmental acts *in support of* religion. Indeed,

Agostini answered the question of whether New York could permissibly provide financial support to sectarian schools under a neutrally applicable funding scheme, not whether New York was *required* to provide such aid to sectarian institutions. The court agrees with the Maine Supreme Court's observation that the Establishment Clause "has no role in requiring government assistance to make the practice of religion more available or easier. It simply does not speak to governmental actions that fail to support religion." *Bagley*, 728 A.2d at 136. The court rejects Davey's claim that the Establishment Clause requires Washington to fund his religious education.

3. First Amendment Free Speech and Association Clause

Davey claims that his freedom of speech was abridged by the state's failure to fund his education

at Northwest College because 1) Northwest is within the ambit of the First Amendment when it teaches theology to its students; 2) the First Amendment protects the rights of both speakers and listeners; and 3) the First Amendment also protects symbolic communicative acts.

Again, Davey chose to ignore the distinction between his constitutionally-protected right to freedom of speech and association, and a non-existent right to compel the state to subsidize these rights. He simply cannot identify any restriction on his freedom to speak and has no basis for *requiring* the state to fund the exercise of his First Amendment rights. Although Washington decided not to fund Davey's expression of his religious ideals, it certainly placed no obstacle or other restriction on that expression. Moreover, even if his decision to pursue

religious training in the face of losing the Scholarship was symbolic speech challenging HECB's policy, the conduct being restricted is not his ability to disagree with the HECB policy, nor his right to declare a major of his choosing. The conduct being restrained is his use of state funds to prepare to enter the clergy.

Nevertheless, Davey argues that he has free speech interests at stake because the Washington Promise Scholarship created a limited public forum, and that once such a forum is created, the state may not discriminatorily deny access to the forum on content or viewpoint grounds. The Supreme Court has held that the government creates a limited public forum when it subsidizes private speech using a generally applicable and neutral funding scheme. *Rosenberger v. Rector and Visitors of University of*

Virginia, 515 U.S. 819 (1995). *Rosenberger* involved a University of Virginia program that paid the private printing costs for student-run journalistic publications out of its student activities fund. The University attempted to withhold funding for a particular student newspaper because it "primarily promotes or manifests a particular belie[f] in or about a deity or ultimate human reality." *Id.* at 823 (alterations in original). The petitioning students claimed that exclusion of their theological viewpoint was a violation of their freedom of speech. The Court held that, by adopting a generally available funding program for the purpose of supporting private student speech, the University created a "metaphysical" public forum that prevented it from denying access on discriminatory grounds focusing on the content or viewpoint of the students'

expression. *Id.* at 830. The Court also rejected the University's argument that the central issue was not denial of access to facilities, but rather permissible denial of funding. *Id.* at 832-35.

Rosenberger is inapposite to the present case. The Promise Scholarship does not create a public forum.[3] The purpose of the Scholarship was not to subsidize student speech or to invite expression of a diversity of viewpoints, but simply to pay for educational expenses. That distinction alone dooms Davey's claim. In addition, the Promise Scholarship is not generally available, and Davey's viewpoint is not singled out for disfavored treatment. Instead, availability of the Promise Scholarship is expressly limited by the constitutional, statutory and HECB

[3] Because the court finds that no manner of public forum was created in this case, it need not address Davey's arguments relying on *Widmar v. Vincent*, 454 U.S. 263 (1981).

policy provisions that prohibit use of state funds to pursue religious education. Moreover, Davey's religious viewpoint is immaterial to the operation of the constitutional and statutory bar on the expenditure of state funds; under applicable Washington law it simply does not matter *which* ministry Davey chose to pursue, because all religious pursuits are equally ineligible. Davey has not demonstrated that a public forum was created, and *Rosenberger* does not apply to the case at bar.

Davey also claims that his First Amendment right to free association has been violated by being denied the Promise Scholarship. He describes the Northwest College community as an expressive association that aims to learn and transmit Christian values and knowledge. Plaintiff's Memorandum in Support of Summary Judgment at

14. It is not disputed that the right to freedom of association is a necessary correlate to the constitutionally protected right to freedom of speech, *see Roberts v. United States Jaycees*, 468 U.S. 609 (1984), or that the government may unconstitutionally abridge that freedom of association if it intrudes into the internal structure or affairs of an association. *Boy Scouts of Amer. v. Dale*, __ S. Ct. __, 2000 WL 82694, *4 (2000).

Davey presents no evidence indicating that Washington has interfered with the internal structure or affairs of Northwest College. Rather, Davey claims that his right to freedom of association was violated because he had to work a few extra hours per week, instead of spending those hours in "study, investigation and worship with his fellow students." Plaintiff's Memorandum in Support of

Summary Judgment at 14. This *de minimis* burden is wholly insufficient to make out a claim on First Amendment grounds. Washington has enacted no law that would prevent Davey from seeking out and enjoying the companionship of any of his classmates, or that would prevent Northwest College from freely structuring its affairs. Davey's right to free association does not encompass a right to have the state subsidize his religious education in order to free him of the real world obligations of supporting himself during school. Even construing all facts in the light most favorable to him, Davey's free association claim lacks merit.

4. Fourteenth Amendment Equal Protection Clause

Davey claims that he was denied scholarship aid in violation of the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection

Clause requires that people similarly situated receive equal treatment under the law. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1977). Davey claims that, under *Cleburne*, HECB's decision "impinge[d] on [his] personal rights protected by the Constitution," and that the decision may stand only if defendants offer a compelling state interest. Plaintiff's Memorandum in Support of Summary Judgment at 8, *citing Cleburne*, 473 U.S. at 440. Davey's statement of the law is correct, but his claim founders on the fact that none of his constitutional rights were abridged.

That notwithstanding, Davey claims that there may be a deprivation of Equal Protection where a state statute treats similarly situated individuals differently based on criteria wholly unrelated to the objective of the statute, relying on

Reed v. Reed, 404 U.S. 71 (1971). On this score, Davey's analysis is confused. He claims that Washington's prohibitions on the use of state funds to support religious instruction are unrelated to the objective of the Promise Scholarship, which is to prepare Washingtonians to "meet the challenges of the 21st century." However, it is not the Promise Scholarship's purpose that is relevant under *Reed*, but rather the purpose of RCW 28B.10.814. The purpose of that statutory provision is to prevent violation of the state constitution's establishment clause, and Washington's statutory treatment satisfies *Reed's* requirement that it be "reasonable, not arbitrary, and . . . rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *Reed*, 404 U.S. at 76

(quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920)).

5. Vagueness Under the Fourteenth Amendment

Davey claims that the HECB policy against using state funds to pursue a degree in theology is an unconstitutionally vague restriction of his speech. A law is void for vagueness if it 1) leaves the public guessing as to what it means; or 2) invites arbitrary and discriminatory enforcement by allowing unbridled discretion in its enforcement. *Grayned v. City of Rockford*, 408 U.S. 104 (1972). Davey has failed to show that either prong of the *Grayned* test is violated in the instant case. The import of HECB's policy and RCW 28B.10.814 is abundantly clear.[4]

[4] The court also notes that neither Davey nor Lana Walter, the Financial Aid Administrator at Davey's chosen college, had any difficulty understanding just what it means to prohibit the use of state funds to pursue a degree in theology.

Any ambiguity in the term "pursue" or the phrase "a degree in theology" is lifted when the policy and statute are read in light of the state constitution's restriction on support to any religious worship, exercise or instruction.

Nor does the policy allow unbridled discretion. The prohibition on use of state funds to pursue a degree in theology is absolute, and there is no room reserved for individual determination. While the state may have delegated to school officials the duty of determining when a student is pursuing a degree in theology, this in itself does not imply an exercise of unbridled discretion. Rather, the delegation of that duty avoids entangling the state in determining what is and what is not religious worship, exercise or instruction. For these reasons, the court rejects Davey's vagueness argument.

III. CONCLUSION

For the reasons detailed above, the court hereby DENIES Davey's motion for summary judgment, and GRANTS HECB's motion for summary judgment. As a matter of law, HECB is entitled to complete dismissal of Davey's complaint.

DATED at Seattle, Washington this 5th day of October, 2000.

// signed //
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
NOV 26 2002
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

JOSHUA DAVEY,

Plaintiff-Appellant,

v.

GARY LOCKE, Gov., individually and in his official capacity; MARCUS S. GASPARD, individually, and in his official capacity as Executive Director of the Higher Education Coordinating Board; BOB CRAVES, individually, and in his official capacity as Chair of the Higher Education Coordinating Board; JOHN KLACIK, individually, and in his official capacity as Associate Director of the Higher Education Coordinating Board,

Defendants-Appellees.

No. 00-35962

D.C. No. CV-00-00061-BJR

ORDER

Before: RYMER, McKEOWN, and GOULD, Circuit Judges.

A majority of the panel has voted to deny the petition for rehearing and petition for rehearing en banc. Judge McKeown voted to grant the petition for rehearing and petition for rehearing en banc.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to hear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

Washington Constitution
Article I, Religious Freedom

§ 11 – Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment: PROVIDED, HOWEVER, That this article shall not be so construed as to forbid the employment by the state of a chaplain for such of the state custodial, correctional, and mental institutions, or by a county's or public hospital district's hospital, health care facility, or hospice, as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.

Wash. Laws of 1999, ch. 309

NEW SECTION. **Sec. 611. FOR THE HIGHER EDUCATION COORDINATING BOARD—FINANCIAL AID AND GRANT PROGRAMS**

General Fund—State Appropriation (FY 2000)	$ 106,945,000
General Fund—State Appropriation (FY 2001)	$ 117,807,000
General Fund-Federal Appropriation	$ 2,422,000
Advanced College Tuition Payment Program Account—State Appropriation	$ 3,408,000
TOTAL APPROPRIATION	$ 230,582,000

The appropriations in this section are subject to the following conditions and limitations:

. . . .

(6) $103,686,000 of the general fund—state appropriation for fiscal year 2000 and $114,700,000 of the general fund—state appropriation for fiscal year 2001 are provided solely for student financial aid, including all administrative costs. Of these amounts:

. . . .

(i) $2,800,000 of the general fund—state appropriation for fiscal year 2000 and $6,200,000 of the general fund—state appropriation for fiscal year 2001 are provided solely to establish the Washington promise scholarship program subject to the following conditions and limitations:

(i) Within available funds, the higher education coordinating board shall award scholarships for use at accredited institutions of higher education in the state of Washington to as many students as possible from among those qualifying under (iv) and (v) of this

subsection. Each qualifying student will receive two consecutive annual installments, the value of each not to exceed the full-time annual resident tuition rates charged by community colleges.

(ii) Of the amounts provided, no more than $250,000 each year is for administration of the Washington promise scholarship program.

(iii) The Washington's promise scholarship account is created in the custody of the state treasurer. The account shall be a discrete nonappropriated account. Other than funds provided for program administration, the higher education coordinating board shall deposit in this account all money received for the program. The account shall be self-sustaining and consist of funds appropriated by the legislature for these scholarships, private contributions, and receipts from refunds of tuition and fees.

(iv) Seniors in the top ten percent of their individual Washington state high school class in 1999 and whose family income does not exceed one hundred and thirty-five percent of the state's median family income, adjusted for family size qualify for a scholarship in fiscal year 2000.

(v) Seniors in the top fifteen percent of their individual Washington state high school class in 2000 and whose family income does not exceed one hundred thirty-five percent of the state's median family income, adjusted for family size qualify for a scholarship in fiscal year 2001.

(vi) For students eligible under subsections (iv) and (v) of this subsection, the superintendent of public instruction shall provide the higher education

coordinating board with then names, addresses, and unique numeric identifiers of students in the top ten percent, or top fifteen percent, as appropriate in each of the respective high school senior classes in Washington state. This shall be provided no later than August 1 of each year.

(vii) Scholarships awarded under this section may only be used at accredited institutions of higher education in the state of Washington for college-related expenses, including but not limited to, tuition, room and board, books, materials, and transportation. The Washington promise scholarship award shall not supplant other scholarship awards, financial aid, or tax programs related to postsecondary education. Scholarships may not be transferred or refunded to students.

(viii) The higher education coordinating board shall evaluate the impact and effectiveness of the Washington promise scholarship program. The evaluation shall include, but not be limited to: (A) An analysis of other financial assistance promise scholarship recipients are receiving through other federal, state, and institutional programs, including grants, work study, tuition waivers, tax credits, and loan programs; (B) an analysis of whether the implementation of the promise scholarship program has had an impact on student indebtedness; and (C) an evaluation of what types of students are successfully completing high school but do not have the financial ability to attend college because they cannot obtain financial aid or the financial aid is insufficient. The board shall report its findings to the governor and the legislature by November 1, 2001.

(ix) The higher education coordinating board may adopt rules as necessary to implement this program.

Wash. Rev. Code 28B.10.814
State student financial aid program – Theology student denied aid.
No aid shall be awarded to any student who is pursuing a degree in theology.

Wash. Rev. Code 28B.119.005
Intent – Finding.
The legislature intends to strengthen the link between postsecondary education and K-12 education by creating the Washington promise scholarship program for academically successful high school graduates from low and middle-income families. The legislature finds that, increasingly, an individual's economic viability is contingent on postsecondary educational opportunities, yet the state's full financial obligation is eliminated after the twelfth grade. Students who work hard in kindergarten through twelfth grade and successfully complete high school with high academic marks may not have the financial ability to attend college because they cannot obtain financial aid or the financial aid is insufficient.

Wash. Rev. Code 28B.119.010
Program design – Parameters.
The higher education coordinating board shall design the Washington promise scholarship program based on the following parameters:

(1) Scholarships shall be awarded to students graduating from public and approved private high schools

under chapter 28A.195 RCW and students participating in home-based instruction as provided in chapter 28A.200 RCW who meet both an academic and a financial eligibility criteria.

(a) Academic eligibility criteria shall be defined as follows:

(i) Beginning with the graduating class of 2002, students graduating from public and approved private high schools under chapter 28A.195 RCW must be in the top fifteen percent of their graduating class, as identified by each respective high school at the completion of the first term of the student's senior year; or

(ii) Students graduating from public high schools, approved private high schools under chapter 28A.195 RCW, and students participating in home-based instruction as provided in chapter 28A.200 RCW must equal or exceed a cumulative scholastic assessment test I score of twelve hundred on their first attempt or must equal or exceed a composite American college test score of twenty-seven on their first attempt.

(b) To meet the financial eligibility criteria, a student's family income shall not exceed one hundred thirty-five percent of the state median family income adjusted for family size, as determined by the higher education coordinating board for each graduating class. Students not meeting the eligibility requirements for the first year of scholarship benefits may reapply for the second year of benefits, but must still meet the income standard set by the board for the student's graduating class.

(2) Promise scholarships are not intended to supplant any grant, scholarship, or tax program related to postsecondary education. If the board finds that promise scholarships supplant or reduce any grant, scholarship, or tax program for categories of students, then the board shall adjust the financial eligibility criteria or the amount of scholarship to the level necessary to avoid supplanting.

(3) Within available funds, each qualifying student shall receive two consecutive annual awards, the value of each not to exceed the full-time annual resident tuition rates charged by Washington's community colleges. The higher education coordinating board shall award scholarships to as many students as possible from among those qualifying under this section.

(4) By October 15th of each year, the board shall determine the award amount of the scholarships, after taking into consideration the availability of funds.

(5) The scholarships may only be used for undergraduate coursework at accredited institutions of higher education in the state of Washington.

(6) The scholarships may be used for undergraduate coursework at Oregon institutions of higher education that are part of the border county higher education opportunity project in RCW 28B.80.806 when those institutions offer programs not available at accredited institutions of higher education in Washington state.

(7) The scholarships may be used for college-related expenses, including but not limited to, tuition, room and board, books, and materials.

(8) The scholarships may not be awarded to any student who is pursuing a degree in theology.

(9) The higher education coordinating board may establish satisfactory progress standards for the continued receipt of the promise scholarship.

(10) The higher education coordinating board shall establish the time frame within which the student must use the scholarship.

Wash. Rev. Code 28B.119.020
Implementation and administration.
The higher education coordinating board, with the assistance of the office of the superintendent of public instruction, shall implement and administer the Washington promise scholarship program described in RCW 28B.119.010 as follows:

(1) The first scholarships shall be awarded to eligible students enrolling in postsecondary education in the 2002-03 academic year.

(2) The office of the superintendent of public instruction shall provide information to the higher education coordinating board that is necessary for implementation of the program. The higher education coordinating board and the office of the superintendent of public instruction shall jointly establish a timeline and procedures necessary for accurate and timely data reporting.

(a) For students meeting the academic eligibility criteria as provided in RCW 28B.119.010(1)(a), the office

of the superintendent of public instruction shall provide the higher education coordinating board with student names, addresses, birth dates, and unique numeric identifiers.

(b) Public and approved private high schools under chapter 28A.195 RCW shall provide requested information necessary for implementation of the program to the office of the superintendent of public instruction within the established timeline.

(c) All student data is confidential and may be used solely for the purposes of providing scholarships to eligible students.

(3) The higher education coordinating board may adopt rules to implement this chapter.

Wash. Admin. Code 250-80-010
Purpose.

The Washington promise scholarship program recognizes and encourages the aspiration for superior academic achievement of high school students who attend and graduate from Washington high schools. The program offers a two-year scholarship for eligible students that may be used at any accredited institution within the borders of the state. The scholarship may also be used at certain Oregon institutions offering programs not offered in Washington.

Wash. Admin. Code 250-80-020
Definitions.

(1) "Board" means the higher education coordinating board.

(2) "OSPI" means the office of the superintendent of public instruction.

(3) "High school" means a secondary institution in Washington state identified by the office of the superintendent of public instruction as qualified to confer high school diplomas to a graduating senior class.

(4) "Parent(s)" mean the biological or adoptive parent of the student applicant and the spouse of a biological or adoptive parent. In cases of divorce or separation the parent for purposes of reporting income and family size is the biological or adoptive parent who provided more than one-half of the applicant's support in the previous twelve

months. The term parent does not include either foster parents or legal guardians.

(5) "Family size" is the number of people for whom the applicant's parent(s) provided more than one-half of the support in the previous twelve months.

(6) "Income," in most cases means the applicant parent's adjusted gross income (AGI) as reported on the previous calendar year's federal tax return. For the independent student, income means the student's adjusted gross income as reported on the previous calendar year's federal tax return.

(7) "Independent student" means a student whose biological parents are both deceased and there is no adoptive parent, or the student is a "ward of the court," or the student has been legally emancipated by court order. The board may also recognize a student as independent due to exceptional circumstances as recognized by the appeal committee.

(8) "Appeals committee" means a committee convened by the board to review petitions and requests by students for consideration of individual exceptional circumstances.

(9) "Median family income (MFI)" means the median income for the state of Washington, by family size, as compiled by the federal Bureau of the Census and reported annually in the *Federal Register*.

(10) "Income cutoff" means one hundred thirty-five percent of the median family income.

(11) "Academic year" means the fall, winter, and spring quarters or the fall and spring semesters between July 1st and June 30th.

(12) "Eligible student" means a person who:

(a) Graduates from a public or private high school located in the state of Washington; and

(b) Is in the top fifteen percent of his or her 2000 graduating class; or

(c) Attained a cumulative score of 1200 or better on the Scholastic Assessment Test I (SATI) on the first attempt; or

(d) Attained a cumulative score of 27 or better on the American College Test (ACT) on the first attempt; and

(e) Has a family income less than one hundred thirty-five percent of the state's median; and

(f) Enrolls at least half time in an eligible postsecondary institution in the state of Washington; and

(g) Is not pursuing a degree in theology.

(13) "Eligible postsecondary institution" means:

(a) A public institution authorized by the Washington legislature and receiving operating support through the state general fund; or

(b) A postsecondary institution, whose campus or branch campus is physically located in the state of

Washington, and who is accredited by a nationally recognized accrediting body. The recognized accrediting bodies are:

(i) Northwest Association of Schools and Colleges or a similar regional accrediting body as determined by the board;

(ii) Accrediting Bureau of Health Education Schools;

(iii) Accrediting Council for Continuing Education and Training;

(iv) Accrediting Commission of Career Schools and Colleges of Technology;

(v) The Accrediting Council for Independent Colleges and Schools;

(vi) The National Accrediting Commission of Cosmetology Arts and Sciences;

(vii) Middle States Association of Colleges and Schools, Commission on Higher Education;

(viii) New England Association of Schools and Colleges;

(ix) North Central Association of Colleges and Schools;

(x) Southern Association of Colleges and Schools;

(xi) Western Association of Schools and Colleges; or

(c) An accredited Oregon postsecondary institution that offers a program not offered in Washington and is located in either Columbia, Gilliam, Hood River, Multnomah, Clatsop, Clackamas, Morrow, Sherman, Umatilla, Union, Wallowa, Wasco or Washington county. The institution must be accredited by one of the accrediting bodies listed above; and

(d) Agrees to administer the program in accordance with the applicable rules and program guidelines.

(14) "Authorized use period" means the period of time the eligible student has to complete using his or her scholarship.

Wash. Admin. Code 250-80-030
Application procedure.

(1) The eligible student will make application directly to the board.

(2) The completed application will include a data sheet, signed certification statement, a copy of the parent's previous calendar year's federal tax return for the purpose of verifying the income, and any other documentation requested by the board in response to missing, incomplete, or unclear information. Student income information will be accepted, in lieu of parental

information, when the board recognizes the applicant as being an independent student.

(3) The board will treat all applications in a confidential manner.

(4) Applications will be made available through several means including:

(a) Mailings to public and private high school principals in the state;

(b) Posting on the HECB website (HTTP://WWW.HECB.WA.GOV/);

(c) Direct mailing to students.

(5) The board will annually set a deadline for the receipt of applications from that year's eligible graduating high school seniors and the deadline for renewal applications from eligible students having graduated in prior years.

(6) Applications must be received by the deadline for each graduating class of high school seniors to be considered for payment at any time during the authorized use period.

Wash. Admin. Code 250-80-040
Recipient selection.

(1) Recipients include all eligible students who have completed applications prior to the annual deadline, who

are verified as having finished in the top ten percent of their senior graduating high school class, and who enroll in an eligible school.

(2) The student who is determined eligible for the first year of scholarship benefits is also presumed eligible for the second year's benefits. The student will not need to provide income information after once establishing his or her eligibility.

(3) Students not meeting the eligibly requirements for the first year of scholarship benefits may reapply for the second year of benefits.

(4) Eligibility determinations made by the appeals committee are final.

Wash. Admin. Code 250-80-050
Authorized award amounts.

(1) The maximum annual authorized award shall not exceed the representative average annual tuition and fees for resident students attending the state's community and technical colleges, as determined by the board.

(2) The actual authorized annual award for each recipient shall be the annual appropriation, as determined by the board to be available for grants, evenly prorated among the eligible students.

Wash. Admin. Code 250-80-060
Grant disbursement.

(1) Eligible students must enroll on at least a half-time status in order to receive a scholarship disbursement.

(2) Grants to students will be disbursed in equal payments, once per term, across the three quarter or two semester academic year.

(3) State of Washington public colleges and universities may request payment for funds up to the limit of the per term award for each enrolled eligible student. The state public college or university may apply the proceeds of the scholarship to any outstanding debt owed by the student to the institution. The institution must disburse any remainder directly to the eligible student.

(4) Nonstate institutions may request that checks be written to eligible students attending their schools. The board will write individual warrants payable to each eligible student and delivered to the school for disbursement.

(5) The independent university and the private vocational school must disburse the warrant once the student's half-time or greater enrollment has been verified. The school may not withhold or delay disbursement for any reason other than for less than half-time enrollment. The school has thirty days to either disburse the warrant or return it to the board.

Wash. Admin. Code 250-80-100
Program administration.

(1) The higher education coordinating board shall administer the program. The board shall be responsible for:

(a) Collection of student applications;

(b) Determination of student eligibility;

(c) Determination of the eligibility of postsecondary institutions within Washington;

(d) Adjudication of all appeals;

(e) Disbursement of awards; and

(f) Maintenance of records.

(2) The OSPI shall be responsible for:

(a) Certifying the list of qualified high schools in the state of Washington;

(b) Providing guidance to high schools as to how the top ten percent or fifteen percent of each senior graduating class shall be determined;

(c) Specifying the number of students per high school that may be named as comprising the top ten percent or top fifteen percent of the graduating class;

(d) The collection and compilation of the list from each high school of the top ten percent or top fifteen percent of each graduating high school class; and

(e) The delivery of that list to the board.

California Constitution
Article XVI, Public Finance

§ 5 – Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the State, or any city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever; provided, that nothing in this section shall prevent the Legislature granting aid pursuant to Section 3 of Article XVI.

Delaware Constitution
Article X, Education

§ 3 – Use of educational funds by religious schools; exemption of school property from taxation. Section 3. No portion of any fund now existing, or which may hereafter be appropriated, or raised by tax, for educational purposes, shall be appropriated to, or used by, or in aid of any sectarian, church or denominational school; provided, that all real or personal property used for school purposes, where the tuition is free, shall be exempt from taxation and assessment for public purposes.

Florida Constitution
Article I, Declaration Of Rights

§ 3 – There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

Georgia Constitution
Article I, Section 2, Origin And Structure Of Government

Paragraph VII – Separation of church and state. No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution.

Hawaii Constitution
Article X, Education – Public Education

§ 1 – The State shall provide for the establishment, support and control of a statewide system of public schools free from sectarian control, a state university, public libraries and such other educational institutions as may be deemed desirable, including physical facilities therefor. There shall be no discrimination in public educational institutions because of race, religion, sex or ancestry; nor shall public funds be appropriated for the

support or benefit of any sectarian or private educational institution, except that proceeds of special purpose revenue bonds authorized or issued under section 12 of Article VII may be appropriated to finance or assist not-for-profit corporations that provide early childhood education and care facilities serving the general public.

Idaho Constitution
Article IX, Education And Schools Lands

§ 5 – Sectarian Appropriations Prohibited. Neither the legislature nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian or religious society, or for any sectarian or religious purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church, sectarian or religious denomination whatsoever; nor shall any grant or donation of land, money or other personal property ever be made by the state, or any such public corporation, to any church or for any sectarian or religious purpose; provided, however, that a health facilities authority, as specifically authorized and empowered by law, may finance or refinance any private, not for profit, health facilities owned or operated by any church or sectarian religious society, through loans, leases, or other transactions.

Kentucky Constitution
§ 189, School Money Not To Be Used For Church, Sectarian, Or Denominational School

No portion of any fund or tax now existing, or that may hereafter be raised or levied for educational purposes, shall be appropriated to, or used by, or in aid of , any church, sectarian or denomination school.

Massachusetts Constitution
Article XLVI, Amendments

Article 46. (In place of article XVIII of the articles of amendment of the constitution ratified and adopted April 9, 1821, the following article of amendment, submitted by the constitutional convention, was ratified and adopted November 6, 1917.)

Article XVIII.

§ 2 – All moneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the commonwealth for the support of common schools shall be applied to, and expended in, no other schools than those which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is expended; and no grant, appropriation or use of public money or property or loan of public credit shall be made or authorized by the commonwealth or any political division thereof for the purpose of founding, maintaining or aiding any other school or institution of learning, whether under public control or otherwise, wherein any denominational doctrine is inculcated, or any other school, or any college, infirmary, hospital,

institution, or educational, charitable or religious undertaking which is not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the commonwealth or federal authority or both, except that appropriations may be made for the maintenance and support of the Soldiers' Home in Massachusetts and for free public libraries in any city or town, and to carry out legal obligations, if any, already entered into; and no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society.

Missouri Constitution
Article IX, Education

Prohibition of public aid for religious purposes and institutions.

§ 8 – Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever.

Montana Constitution
Article X, Education And Public Lands

§ 6 – Aid prohibited to sectarian schools.

(1) The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.

(2) This section shall not apply to funds from federal sources provided to the state for the express purpose of distribution to non-public education.

Nevada Constitution
Article XI, Education

§ 10 – No public money to be used for sectarian purposes. No public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purpose.

New Mexico Constitution
Article XII, Education

§ 3 – [Control of constitutional educational institutions; use of state land proceeds and other educational funds.]

The schools, colleges, universities and other educational institutions provided for by this constitution shall forever remain under the exclusive control of the state, and no part of the proceeds arising from the sale or disposal of

any lands granted to the state by congress, or any other funds appropriated, levied or collected for education purposes, shall be used for the support of any sectarian, denominational or private school, college or university.

North Dakota Constitution
Article VIII, Education

§ 5 – All colleges, universities, and other educational institutions, for the support of which lands have been granted to this state, or which are supported by a public tax, shall remain under the absolute and exclusive control of the state. No money raised for the support of the public schools of the state shall be appropriated to or used for the support of any sectarian school.

Oklahoma Constitution
Article II, Bill Of Rights

§ 5 – Public money or property - Use for sectarian purposes. No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.

Oregon Constitution
Article I, Bill Of Rights

§ 5 – No money to be appropriated for religion. No money shall be drawn from the Treasury for the benefit of any religeous [sic], or theological institution, nor shall any

money be appropriated for the payment of any religeous [sic] services in either house of the Legislative Assembly.

South Dakota Constitution
Article VIII, Education And School Lands

Art. VIII, § 16 – Public support of sectarian instruction prohibited. No appropriation of lands, money, or other property or credits to aid any sectarian school shall ever be made by the state, or any county or municipality within the state, nor shall the state or any county or municipality within the state accept any grant, conveyance, gift, or bequest of lands, money, or other property to be used for sectarian purposes, and no sectarian instruction shall be allowed in any school or institution aided or supported by the state.

Texas Constitution
Article I – Bill Of Rights

§ 7 – Appropriations For Sectarian Purposes. No money shall be appropriated, or drawn from the Treasury for the benefit of any sect, or religious society, theological or religious seminary; nor shall property belonging to the State be appropriated for any such purposes.

Vermont Constitution
Chapter 1, Article III

Article 3rd. Freedom in religion; right and duty of religious worship (notes)

That all persons have a natural and unalienable right, to worship Almightly God, according to the dictates of their own consciences and understandings, as in their opinion shall be regulated by the word of God; and that no person

ought to, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of conscience, nor can any person be justly deprived or abridged of any civil right as a citizen, on account of religious sentiments, or peculiar mode of religious worship; and that no authority can, or ought to be vested in, or assumed by, any power whatever, that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship. Nevertheless, every sect or denomination of Christians ought to observe the sabbath or Lord's day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed will of God.

Wyoming Constitution
Article I, Declaration Of Rights

§ 19 – Appropriations for sectarian or religious societies or institutions prohibited – No money of the state shall ever be given or appropriated to any sectarian or religious society or institution.

SUPREME COURT, U.S.
FILED
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(2)

No. 02-1315

IN THE

Supreme Court of the United States

GARY LOCKE,
GOVERNOR OF THE STATE OF WASHINGTON, *ET AL.*,

Petitioners,

v.

JOSHUA DAVEY,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where a State chooses to award scholarships based on neutral criteria to financially needy, academically gifted students, does the State violate the First and Fourteenth Amendments to the U.S. Constitution when it discriminatorily strips the scholarship from an otherwise eligible student for the sole reason that the student declares a major in theology taught from a religious perspective?

PARTIES

Petitioners correctly identify the parties. Pet. at ii. The petitioners were sued both in their individual and official capacities.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the U.S. Constitution provide as follows:

First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

Fourteenth Amendment, section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

The pertinent provisions of the Washington state constitution and state statutes and regulations are set forth in the petition. *See* Pet. at 1-2; Pet. App. 88a-106a.

INTRODUCTION

The State of Washington awarded respondent Joshua Davey a Promise Scholarship based on financial need and academic achievement. The state permits Promise Scholars to use this scholarship to defray educational expenses for the first two years of *any* course of study at *any* accredited college *except* if the recipient declares a major in theology taught from a religious perspective. When Davey declared a double major in Pastoral Ministries and Business Management and Administration, state law disqualified him from receipt of his Promise Scholarship.

The Ninth Circuit in this case correctly held that this blatant antireligious, viewpoint-based discrimination violates the Free Exercise Clause of the First Amendment (as incorporated through the Fourteenth Amendment) to the U.S. Constitution and that no state constitutional provision or statute justifies that federal constitutional violation. There is no need to review that decision in this Court.

ARGUMENT

The decision below properly conforms to governing Supreme Court precedent. Moreover, there is no conflict with other lower court decisions warranting review. This Court should deny certiorari.

The essential question is whether the state, having chosen to issue Promise Scholarships to economically needy, academically talented students attending accredited colleges, Pet. App. 8a-9a, can strip a scholarship from an otherwise eligible recipient, *id.* at 9a-10a, just because he announces his intention to "pursu[e] a degree in theology taught from a religious perspective," *id.* at 30a. This antireligious, viewpoint-based discrimination clearly offends the federal Constitution.

Petitioners have conceded that respondent Davey faces

discrimination targeting a religious viewpoint. The very premise of their exclusion of Davey from the Promise Scholarship program is that "Davey's coursework towards his Pastoral Ministries major was taught from a viewpoint that the Bible represents 'truth,' and is 'foundational,' as opposed to a purely academic study of the Bible." Appellees' Petition for Rehearing and Petition for Rehearing En Banc at 5 (9th Cir. July 30, 2002) (No. 00-35962). *Accord* Pet. App. 9a-10a; *id.* at 12a ("state policy excludes only those [scholarship] recipients who pursue the study of theology from a religious perspective"); *id.* at 15a, 22a, 30a. This concession alone suffices to doom the restriction as offensive to Davey's constitutionally protected rights to free speech, free exercise of religion, equal protection, and freedom from religious establishments.

Notably, the State does *not* defend its antireligious discrimination by invoking the federal Establishment Clause. Such a defense would in any event be meritless. *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986).

I. NO CONFLICT WITH THE WASHINGTON SUPREME COURT WARRANTS REVIEW.

The centerpiece of the State's petition for certiorari is a purported conflict between the Ninth Circuit's decision below and the fourteen-year-old decision of the Supreme Court of Washington in *Witters v. State Commission for the Blind*, 112 Wash. 2d 363, 771 P.2d 1119 (1989) (*Witters III*). No such conflict warrants review. First, intervening decisions of this Court and of the state supreme court have undermined the *Witters III* decision, thereby eroding any such conflict. *Infra* § I(B), (C). Any claim that there is a current conflict is speculative and unripe. Second, any supposed lingering conflict between *state* constitutional law and *federal* constitutional law presents no

more than a well-settled question of federal supremacy.

A closer look at the *Witters* litigation and subsequent federal and state case law demonstrates the weakness of the State's asserted conflict.

A. Recap of *Witters* litigation

In *Witters*, the State of Washington denied vocational assistance to an otherwise qualified blind student merely because he pursued a degree in biblical studies. *Witters v. State Comm'n for the Blind*, 102 Wash. 2d 624, 626, 689 P.2d 53, 54-55 (1984) (*Witters I*). The state supreme court made three holdings. First, the court ruled that the federal Establishment Clause forbade state aid to a person studying to be a pastor, missionary, or church youth director. Second, the court held that this denial did not violate the federal Free Exercise Clause. And third, the court found that this denial did not violate the federal Equal Protection Clause. *Id.* at 627-32, 689 P.2d at 55-58.

This Court granted review and unanimously reversed the state supreme court. *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (*Witters II*). This Court rejected the state supreme court's first holding, ruling instead that the federal Establishment Clause posed no bar to a neutral educational aid program that allowed recipients, by their own independent choice, to pursue religious studies. *Id.* at 485-89. The Court did not reach the state supreme court's second (Free Exercise) and third (Equal Protection) holdings. *Id.* at 489. Instead, this Court remanded for further proceedings. *Id.* at 489-90.

On remand, the Washington supreme court ruled that the *state* constitution barred the aid in question. *Witters III*, 112 Wash. 2d at 368-70, 771 P.2d at 1121-22. The court adhered to its prior conclusion that this denial did not offend the federal Free Exercise Clause. *Id.* at 370-72, 771 P.2d at 1122-23. The court

also reaffirmed that the denial did not offend the federal Equal Protection Clause.[1] *Id.* at 372-73, 771 P.2d at 1123-24.

B. *Witters* and the Washington Constitution

The State claims that the Supreme Court of Washington "continues to adhere to the principle in *Witters III* that the Washington Constitution prohibits using public funds to pay for religious instruction." Pet. at 12. This proposition of *state* constitutional law is dubious, at best, and -- more importantly -- totally irrelevant to the question whether the Ninth Circuit and the Washington supreme court conflict over the meaning of the *federal* Free Exercise Clause.

As to the dubiousness of the State's claim, one need only note the state supreme court's marked distancing of itself from *Witters III*'s strict separationist approach in subsequent decisions. In *Malyon v. Pierce County*, 131 Wash. 2d 779, 935 P.2d 1272 (1997), which upheld a county sheriff's chaplaincy program, the state supreme court barely cited the majority in *Witters III*,[2] indirectly criticized that decision for incorrect state constitutional analysis, *Malyon*, 131 Wash. 2d at 791 n.10, 935 P.2d at 1278 n.10, and instead cited the *dissents* in *Witters I* and *Witters III*, *see Malyon*, 131 Wash. 2d at 802 n.35, 803 n.37, 935 P.2d at 1283 n.35, 1284 n.37. Significantly, the *Malyon* court held that only appropriations with "a religious purpose" violate the state constitution. *Id.* at 799, 935 P.2d at 1282. Thus, under *Malyon*, a state scholarship program with a secular purpose -- like the assistance program in *Witters* and the Promise Scholarship program here -- would pass state constitutional muster. As the

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[1]This Court denied review. *Witters v. Washington Dep't of Servs. for the Blind*, 493 U.S. 850 (1989).

[2]The court labeled its prior decision "*Witters II*," apparently not counting this Court's decision.

Malyon court explained, an "appropriation of money . . . to effectuate any objective other than worship, exercise, instruction, or religious establishment is not within the prohibition," regardless of any "[u]ltimate utilization of the money" for religious purposes. 131 Wash. 2d at 799-800, 935 P.2d at 1282. And in *State ex rel. Gallwey v. Grimm*, 146 Wash. 2d 445, 48 P.3d 274 (2002), the court cited *Witters III*[3] only to distinguish it, *Gallwey*, 146 Wash. 2d at 467-68, 48 P.2d at 285, not to approve it, contrary to the State's claim, Pet. at 12.[4] Significantly, the *Gallwey* court held that *Malyon* governs educational assistance cases, *Gallwey*, 146 Wash. 2d at 470-71, 48 P.3d at 286-87, expressly rejecting the dissent's view that *Malyon* must yield to the stricter separationist precedents, including *Witters III*, in the educational context, *see Gallwey*, 146 Wash. 2d at 492-98, 48 P.3d at 297-300 (Chambers, J., dissenting).[5]

In short, by all indications the Supreme Court of Washington would not decide *Witters III* the same way today. While the state supreme court has not yet formally overruled *Witters III*, it has discarded its rationale. Thus, the asserted conflict with *state* constitutional law the State perceives here most likely does not

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[3]Again, the state supreme court denominated the decision as *Witters II*. *See supra* note 2.

[4]The financial aid program at issue in *Gallwey* contained restrictions on religious programs even stricter than those at issue here. *See* 146 Wash. 2d at 453, 48 P.3d at 278. However, no challenge to those restrictions was before the court.

[5]The dissent cited *Witters III* as in accord with the older, more strictly separationist educational cases, and admitted that *Malyon*'s analysis "does not fit" with this prior line of cases. *Gallwey*, 146 Wash. 2d at 497, 48 P.3d at 300. The clear implication of both the majority and the dissent in *Gallwey* is that *Malyon* has superseded *Witters III* in educational assistance cases.

even exist; at a minimum, it would be premature and unripe to resolve such a hypothetical alleged conflict.

But more fundamentally, the question whether the Washington Constitution forbids the award of a Promise Scholarship to respondent Davey, while interesting as a matter of *state* constitutional law, is irrelevant to the question of respondent's *federal* Free Exercise rights. The Constitution expressly affords supremacy to federal constitutional rights over contrary state constitutional (and statutory) law. U.S. Const. art. VI, cl. 2 ("This Constitution . . . shall be the supreme Law of the land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"). Not surprisingly, then, this Court has repeatedly rebuffed attempts to exalt state law over federal equal access claims. *See Widmar v. Vincent*, 454 U.S. 263, 275-76 (1981); *Good News Club v. Milford Central School*, 533 U.S. 98, 107 n.2 (2001). Hence, the unlikely possibility that the Ninth Circuit's *federal* constitutional holding might conflict with the state supreme court's *state* constitutional interpretation is not a grounds for review here.

C. *Witters* and the Free Exercise Clause

The State's claim of a square conflict between the Ninth Circuit and the Washington supreme court on a point of *federal* constitutional law, namely, the meaning of the Free Exercise Clause, fares no better. A closer examination of the purported conflict severely undermines the State's claim.

The Ninth Circuit in this case held (correctly) that the discriminatory exclusion, of an otherwise eligible participant, from a state educational assistance program, just because the would-be participant intends to pursue a religious degree *from a religious perspective*, is a straightforward penalty for, and thus a violation of, the right to the free exercise of religion. The

Supreme Court of Washington, in *Witters I* and *Witters III*, essentially held the opposite. If that were the end of the story, the State might well claim a square conflict. But that is not the end of the story. Subsequent decisions of this Court and of the Washington supreme court severely undermine, indeed overrule, the federal free exercise holdings of *Witters I* and *Witters III*. To assume that the state supreme court *today* would nevertheless adhere to *Witters I* and *Witters III*, despite controlling, contrary, intervening case law, would be speculative at best, and disrespectful of the state judiciary at worst.

The federal Free Exercise analysis in *Witters I* was quite cursory. The state supreme court perceived no coercion in the denial of financial assistance and did not even consider whether the *discriminatory* denial of assistance, with *explicit* targeting of religion, raised Free Exercise concerns. *Witters I*, 102 Wash. 2d at 631, 689 P.2d at 57. The analysis in *Witters III* simply echoed this brief treatment. 112 Wash. 2d at 370-72, 771 P.2d at 1122-23.

The *Witters* decisions, however, predated this Court's rulings in *Employment Division v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). In those two decisions, this Court made crystal clear that *express or purposeful discrimination against religious exercise as such* strikes at the core of the Free Exercise Clause. *See Smith*, 494 U.S. at 877; *Lukumi*, 508 U.S. at 532-33. In light of *Smith* and *Lukumi*, the *Witters* decisions are simply no longer good law.

The Supreme Court of Washington itself no longer adheres to the cramped *Witters* approach to antireligious discrimination. In *Malyon*, the court cited the *dissent* in *Witters III* on precisely the Free Exercise point, 131 Wash. 2d at 803 n.37, 935 P.2d at 1284 n.37, while opining that the discriminatory exclusion of ministers

or others openly professing their faith from a government program would run afoul of the "free exercise rights" of those would-be participants, *id.* at 802-03, 935 P.2d at 1283-84. *See also id.* at 809-10 & n.49, 935 P.2d at 1287 & n.49 (citing *Lukumi* and noting Free Exercise concerns with discrimination based on religious identity or conduct).

In sum, the purported conflict between the decision below and the fourteen-year-old *Witters III* decision is not a grounds for review because subsequent controlling case law has completely eroded the precedential status of *Witters III* on the pertinent issue. To assume that the state supreme court would now return to its erroneous ways in *Witters III*, despite the subsequent decisions of this Court and of the state supreme court itself, would be rank speculation. Moreover, such an assumption would fail to credit the state supreme court's obligation and ability to follow established federal law. The mere unlikely possibility that a state court could so err, on the issue at hand, does not present a concrete conflict ripe for review by this Court.

II. NO CONFLICT WITH SUPREME COURT PRECEDENT WARRANTS REVIEW.

Petitioners claim that the decision below conflicts with a line of Supreme Court cases holding that government need not underwrite the exercise of a right. Pet. at 15-17. The court below already dispensed with this contention. Pet. App. 12a, 17a-25a. That government need not pay for something in the first place does not mean it may deny funding in an invidiously discriminatory manner. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995). According to petitioners' faulty logic, *Rosenberger* was wrongly decided, as the university simply sought not to underwrite evangelical speech. Indeed, under petitioners' view a city could charge churches,

synagogues, and other houses of worship -- but no one else -- special user fees for fire, rescue, and police services. Petitioners would perceive no unconstitutional discrimination, as the city would be merely "declining funding." Petitioners' analysis goes badly astray.

Petitioners cite *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974) (mem.), *see* Pet. at 21, but the *Luetkemeyer* case is inapposite. In *Luetkemeyer*, the state denied bus transportation to *all nonpublic* schools, whether religious or not. *See* 364 F. Supp. at 378. Thus, the state denied the benefit to students "because they are enrolled in a nonpublic school," *id.* at 381, *not* because they were enrolled in a nonpublic *religious* school. If Washington were to restrict Promise Scholars to state schools, *Luetkemeyer* might offer constitutional refuge for that restriction. But here, Washington discriminates on the basis of the religious viewpoint of the student's chosen major, not the public/nonpublic nature of the institution the student attends.

III. NO CONFLICT WITH OTHER FEDERAL CIRCUITS WARRANTS REVIEW.

Petitioners do not contend that there is a circuit conflict warranting review. Indeed, the decision below accords with decisions of the Fourth and Eighth Circuits. *See Columbia Union College v. Clarke*, 159 F.3d 151 (4th Cir. 1998), *cert. denied*, 527 U.S. 1013 (1999), *appeal after remand*, *Columbia Union College v. Oliver*, 254 F.3d 496 (4th Cir. 2001); *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998).

In the *Columbia Union College* litigation, the Fourth Circuit held that it violated the First Amendment[6] discriminatorily to

[6]The Fourth Circuit explained that it considered "as one constitutional (continued...)

exclude a potential recipient of state education grants (there, a religiously affiliated college) on the basis that the education was provided from a religious viewpoint. 159 F.3d at 154-56; 254 F.3d at 510.[7] There, state funds were given directly to religious colleges, 159 F.3d at 154, not to particular students. *A fortiori*, under the rule of *Columbia Union College*, respondent Davey in this case would prevail on his First Amendment claim.

In *Peter v. Wedl*, the Eighth Circuit held that it would violate the First Amendment[8] discriminatorily to deny a state-funded paraprofessional to a disabled grade-school child just because he attended a religious school. As the court explained, the state rule

> explicitly discriminated against children who attended private religious schools. While children who attended private nonreligious schools could receive government-funded special education services directly at their private schools, students like Aaron could not. Government discrimination based on religion violates the Free Exercise Clause of the First Amendment, *see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general"), the Free Speech Clause of the First Amendment, *see Rosenberger v. Rector*

[6](...continued)
inquiry" the various equal access arguments posed on grounds of free speech, free exercise, and equal protection rights. 159 F.3d at 155 & n.1.

[7]The principal disputed issue in the *Columbia Union College* litigation was the sufficiency of a federal Establishment Clause defense of the state's funding restriction. The Fourth Circuit ultimately found that defense meritless. 254 F.3d at 498-510. In the present case, petitioners do not even raise a federal Establishment Clause defense.

[8]Like the court in *Columbia Union College*, the *Peter* court invoked the free exercise, free speech, and equal protection guarantees of the federal Constitution. 155 F.3d at 996, 997.

and Visitors of Univ. of Va., 515 U.S. 819, 830 (1995) ("ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts" (quotations omitted)), and the Equal Protection Clause of the Fourteenth Amendment. *See Native American Council of Tribes v. Solem*, 691 F.2d 382, 384 (8th Cir. 1982); *cf. Romer v. Evans*, 517 U.S. 620, 633 (1996) ("Equal protection of the laws is not achieved though indiscriminate imposition of inequalities. . . . A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." (quotations and citations omitted)).

. . . .

> . . . Because [the state rule] cannot be justified as a narrowly tailored means of avoiding a violation of the Establishment Clause, it violated the plaintiffs' rights to free exercise of religion, free speech, and equal protection, and the district court properly enjoined its enforcement.

155 F.3d at 996-97. Here, petitioners do not even raise a federal Establishment Clause defense. Under *Peter*, as under *Columbia Union College*, the merits of respondent Davey's claims follow *a fortiori*.

In sum, the decision below in this case is in harmony with the pertinent decisions of the other circuits.

In the court below, petitioners had invoked *Strout v. Albanese*, 178 F.3d 57 (1st Cir.), *cert. denied*, 528 U.S. 931 (1999), as supposedly conflicting with the decision in the present case. *Strout* is distinguishable, and no alleged conflict with *Strout* warrants review.

Strout, first of all, was essentially overruled in *Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (2002). *Strout* involved a Maine tuition reimbursement program authorizing grants to the school of a student's choice, except for religious schools. The *Strout* court perceived the Establishment Clause as forbidding the inclusion of religious schools in a government student-subsidy program. 178 F.3d at 60-64. This Court rejected that proposition in *Zelman*, which upheld the Cleveland school voucher program. Thus, the *Strout* court's Establishment Clause analysis cannot aid petitioners here.[9] Furthermore, *Strout*'s flawed Establishment holding also infected that court's analysis of other equal access arguments at issue there. *See* 178 F.3d at 64-65 (Establishment concerns foreclose students' Equal Protection claim); *id.* at 65 (Establishment concerns would justify any Free Exercise infringement). In short, *Strout* is no longer good law even in its own circuit.

Strout's Free Exercise analysis, moreover, supplies no convincing basis for reviewing the decision below in the present case. *Strout* noted that the denial of government funding there "does not prevent attendance at a religious school." 178 F.3d at 65. But a penalty on religious exercise need not take the form of

---

[9] *Strout* may also be read to stand for the narrower, more formalistic proposition that the Establishment Clause bars only the "direct payment of tuition by the state to a private sectarian school," 178 F.3d at 61 -- as opposed to direct payment to the *student*, who then signs the check over to the school, *Zelman*, 122 S. Ct. at 2464. Read this way, *Strout* is in tension with *Mitchell v. Helms*, 530 U.S. 793, 816 (2000) (plurality) ("Although the presence of private choice is easier to see when aid literally passes through the hands of individuals . . . there is no reason why the Establishment Clause requires such a form"); *id.* at 818-19 & n.8 (same rule logically may apply to money grants). In any event, this narrower reading of *Strout* would render *Strout* irrelevant in the present case, where Promise Scholarships are paid to the *student*, not to the school. Pet. App. 104a (state schools are paid directly; nonstate schools are sent checks payable to the eligible students).

an absolute bar in order to be discriminatory and unconstitutional. If the city in *Lukumi* had merely imposed a discriminatory excise tax, instead of a prohibition, on the religious practices at issue, the discrimination would have been no less unconstitutional. Likewise, the discriminatory denial of otherwise generally available taxpayer-funded fire and police services only to religious houses of worship would be unconstitutional even if the congregation remained free to obtain the desired services by payment of a fee. *Strout* claimed there was no burden on religious exercise because the religious education at issue was neither required by nor central to the plaintiffs' religion. *Id.* But this Court has explicitly condemned inquiry into the "centrality" of religious practices, *Employment Div. v. Smith*, 494 U.S. 872, 886-87 (1990), and inquiry into the "mandatory" nature of the practice is no less illegitimate, *see Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 171-72 (3d Cir. 2002) (analyzing this Court's cases). Indeed, it is deeply offensive to suggest that government might defend the discriminatory treatment of those pursuing religious rituals (as in *Lukumi*) or vocations (as in *McDaniel v. Paty*, 435 U.S. 618 (1978)) by arguing that the religion in question did not *require* the penalized practice. *Strout* also cited a lack of "animus" on the part of the government. 178 F.3d at 65. But while "animus" might be relevant to proving that a seemingly neutral law is in fact discriminatory, as in *Lukumi*, 508 U.S. at 534, it is not a required element of a Free Exercise violation where the law is facially discriminatory, as in *Strout* (and in the present case). *Lukumi*, 508 U.S. at 534 ("the minimum requirement of neutrality is that a law not discriminate on its face"). The categorical disqualification of parochial (but not other private) high school graduates from eligibility for the local police academy, for example, would be unconstitutional no matter how

assertedly benign the alleged motivation for the discrimination.

In short, *Strout* is replete with legally erroneous analysis. Even if it were not distinguishable, it would offer no sound basis for reviewing the lower court's correct analysis in the present case. But *Strout* is in any event distinguishable, as it involved high school, not college; tuition payments, not general educational expense payments; direct payments to schools, not to students; and a restriction tied to the nature of the school, not to the viewpoint of the specific program.[10]

There is no circuit conflict warranting review.

IV. NO STATE CONSTITUTIONAL ISSUES WARRANT REVIEW.

Petitioners protest that the Ninth Circuit's decision in this case calls into question the "Blaine" amendments of other states. Pet. at 18-23. To the extent such Blaine amendments *require affirmative antireligious discrimination on the basis of religious viewpoints* (a question of state law for each state to resolve), these amendments are indeed in constitutional jeopardy, and rightly so. But this follows, not just because of the decision in this case, but rather because of the important First Amendment

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[10]By no means does respondent mean to suggest that these distinctions make *Strout* defensible; only that they make the case legally distinguishable.

The state supreme court case of *Chittenden Town School District v. Department of Education*, 169 Vt. 310, 738 A.2d 539, *cert. denied*, 528 U.S. 1066 (1999), which follows *Strout*, *see* 169 Vt. at 343-44, 738 A.2d at 563 (rejecting similar Free Exercise claim), is distinguishable for the same reasons as *Strout*. *Chittenden*, moreover, is internally incoherent. *See* 169 Vt. at 344-45, 738 A.2d at 563-64 (acknowledging that denial of government benefit because of religiously motivated choices implicates Free Exercise Clause, but holding that denial of state educational assistance only where private education incorporates "religious worship" "does not implicate the Free Exercise Clause").

principles upheld in cases like *Rosenberger*, *Lukumi*, and *McDaniel*, principles which the court below properly applied to the present case. In any event, it is particularly unpersuasive to appeal to Blaine Amendments as grounds for restricting federal constitutional rights. These Blaine Amendments were products of a wave of nativist, anti-Catholic bigotry. *See* Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 659, 669-75 (1998); Laycock, *The Underlying Unity of Separation and Neutrality*, 46 Emory L.J. 43, 50-53 (1997); Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38, 41-67, 69 (1992). A majority of this Court has acknowledged the Blaine Amendment's origin in this shameful episode of American history. *Mitchell v. Helms*, 530 U.S. at 828 (plurality of Thomas, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.); *Zelman v. Simmons-Harris*, 122 S. Ct. at 2504 (dissent of Breyer, J., joined by Stevens and Souter, JJ.). Petitioners' concern, that striking down one instance of antireligious discrimination may endanger other products of 19th Century antireligious bigotry, provides no legitimate basis for review.

V. THIS CASE IS AN ESPECIALLY POOR CANDIDATE FOR REVIEW.

As demonstrated above, there is no warrant for review here. The facts of the present case, moreover, make this case an especially poor vehicle for reconsidering a ruling in favor of respondent Davey.

Petitioners sound the alarm that the court below is forcing a state to pay for religious education. This is a serious mischaracterization of the real issue, which is: If a state chooses to award scholarships on a neutral basis to financially needy, academically gifted college students, may it discriminatorily strip

the scholarship from a student just because that student declares a major in a religious subject taught from a religious viewpoint? The court below correctly held such discrimination unconstitutional. The facts of this case, moreover, highlight the utter irrationality of the challenged state restriction on Promise Scholarships.

First, the *courses* a Promise Scholar actually takes are irrelevant to the state. What matters is the *major* a student declares. ER[11] 38:9, 54. A Promise Scholar could take numerous theology courses, paid for by state grants, so long as his major was something else (like psychology or math). Contrariwise, a student's declared intent to major in theology bars that student from a Promise Scholarship even if the student takes nothing but language, literature, philosophy, and science courses during the first two years of college (the only years the Promise Scholarship covers, Pet. at 3-4; Pet. App. 8a).[12]

Second, the criterion penalizes the *declaration* of a major, ER 68:4, not the major itself. A Promise Scholar who refrains until the third year of college from declaring a major -- or who sincerely declares a major in some other subject but switches to (or adds as a double major) theology in the third year -- is eligible for a Promise Scholarship. ER 38:37-38. *See also* ER 41:24 (need not declare major during first two years of study). But a student who declares a (theology) major early is barred

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[11]"ER" refers to the Excerpts of Record in the Ninth Circuit.

[12]The petitioners' statement of the question presented, therefore, is misleading. The issue is not the refusal of the state "to fund religious instruction," Pet. at i, or even instruction from a religious viewpoint. The State allows Promise Scholars to use grant money to pay for religious instruction, including from a religious viewpoint, so long as it is not part of a declared major. The actual question presented, then, is that stated herein, *supra* p. i. *See also supra* p. 2 (identifying the "essential question").

from the scholarship, even if he later decides to switch to economics or philosophy.

Third, the open pursuit even of a religious studies *major* is not excluded unless the courses are *taught* from a religious perspective. *Supra* pp. 2-3. A would-be minister is free to use a Promise Scholarship to major in religion at a private secular college or a state college, even though the student does so with every intention of approaching the topic as a devout believer openly planning to pursue a religious vocation. Contrariwise, a theology major with no religious faith and no desire to be a minister, who majors in theology as preparation for an academic teaching career in state schools, is barred from receipt of a Promise Scholarship if -- but only if -- the major is taught from a religious point of view.

In sum, the challenged state rule -- barring only first- and second-year *declared majors* in theology *taught from a religious perspective*, regardless of actual courses studied, regardless of ultimate major or career plans, and regardless of whether the scholarship is even used for tuition (as opposed to other educational expenses, Pet. App. 8a, 91a, 94a (funds may be used for room and board)), is so poorly tied to any supposed state interest in "separation of church and state" as to be utterly arbitrary and irrational. Such a rule flunks constitutional review even under the most lenient of tests.

CONCLUSION

This Court should deny certiorari.

Respectfully submitted,

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NO. 02-1315

IN THE SUPREME COURT OF THE UNITED STATES

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, ET AL.,

Petitioners,

v.

JOSHUA DAVEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

1. Respondent Concedes There Is A Conflict Between The Washington Supreme Court And The Ninth Circuit

In the petition, we argued that review is necessary to resolve the conflict between the decision below and *Witters v. Washington Commission for the Blind*, 112 Wash. 2d 363, 771 P.2d 1119 (1989), *cert. denied sub nom. Witters v. Washington Department of Services for the Blind*, 493 U.S. 850 (1989) (*Witters* III). Pet. at 10-14. Respondent Davey concedes that there is a conflict. Br. Opp. at 7-8 ("The Ninth Circuit in this case held [that there was] a violation of [Davey's] right to the free exercise of religion. The Supreme Court of Washington, in *Witters* I and *Witters* III, essentially held the opposite."). Davey tries to down-play the significance of the conflict with two arguments based on speculation.

First, Davey speculates that the Washington Supreme Court will not adhere to its conclusion in *Witters* III that article I, section 11 of the Washington Constitution prohibits using public funds to pay for religious instruction. Br. Opp. at 5-7. There is no basis for this claim. In *State ex rel. Gallwey v. Grimm*, 146 Wash. 2d 445, 468, 48 P.3d 274, 285 (2002), the Washington Supreme Court's most recent decision involving article I, section 11, the court quoted with approval its earlier conclusion in *Witters v. Washington Commission for the Blind*,

102 Wash. 2d 624, 629, 689 P.2d 53 (1984)(*Witters* I) that it "is not the role of the State to pay for the religious education of future ministers". *Gallwey* upheld the program at issue in the case because the program's religious exclusion "provides that no student will be enrolled in any program that includes religious worship, exercise, or instruction". *Gallwey*, 146 Wash. 2d at 468, 48 P.3d at 285.

Second, Davey speculates that the Washington Supreme Court will apply subsequent decisions of this Court and reverse its decisions in *Witters* I and *Witters* III about the application of the Free Exercise Clause. Br. Opp. at 7-9. Davey relies on *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). Both these cases were decided before *Gallwey*, yet the *Gallwey* court did not apply them to overrule *Witters* I and *Witters* III. Moreover, *Smith* and *Lukumi* deal with laws that actually burden the practice of religion, as opposed to laws that decline to provide public funding of the exercise of a religious right. The application of these decisions to this case is not at all clear and that is an important reason why the Court should grant review. *See* section 2 *infra* page 3-4.

At bottom there is a conflict between the Washington Supreme Court and the Ninth Circuit. As a result, the law in Washington is unknown. Federal courts provide one answer, state courts

another. This is an intolerable situation that requires resolution by this Court.

It is also significant that the Ninth Circuit has essentially ruled that a provision of the Washington Constitution is unconstitutional. Article I, section 11 has been part of the Washington Constitution since statehood in 1889. This Court is the appropriate tribunal to decide whether a state constitutional provision violates the United States Constitution.

2. The Court Should Grant Review To Resolve Confusion About The Application Of Its Decisions

In the petition, we argued that the Ninth Circuit failed to properly apply this Court's decisions. Pet. at 15-18. Davey's response to this argument illustrates why it is important for the Court to grant review—there is confusion about how to apply the Court's decision.

There are three lines of authority. The first holds that the legislative decision not to fund the exercise of a constitutional right does not infringe on that right. *Maher v.* Roe, 432 U.S. 464 (1977). The second line deals with the application of the Free Exercise Clause to laws that actually burden the practice of religion. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). The third line holds that a limited public forum established by the government may not exclude religious speech that falls within the purpose of the

forum. *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819 (1995).

In our view—and that of the dissent in the case below—this case is controlled by *Maher*, the first line of authority. Davey has the right to pursue a degree in theology, but the Free Exercise Clause does not require the State to pay for his religious instruction. The second and third lines do not apply because the scholarship program does not infringe on Davey's ability to practice his religion or obtain a degree in theology and it does not establish a limited public forum for speech. Davey argues that the case should be resolved under *Lukumi* and *Rosenberger*—the second and third lines of authority. Br. Opp. at 8-10. But, Davey does not even discuss the first line of authority.

The majority in the decision below tangled the three lines of authority. Davey resolves the tangle by simply ignoring the first line. The Court should grant review to provide guidance about how these three lines of authority should be applied.

3. The Question Presented Has National Significance

In the petition, we argued that this case has national significance because 19 states have constitutional provisions that expressly prohibit using public funds to support religion and 14 states have statutes that prohibit using public funds to pay for a degree in theology. Pet. at 18, 22. Davey

responds that review is not warranted owing to the dubious motivation that gave rise to the Blaine Amendments. Br. Opp. at 15-16.

This argument misses the point. Whatever the motivation behind the adoption of these state constitutional provisions, the question presented in this case is national in scope—a point Davey does not dispute. Moreover, courts have enforced these stricter state constitutional provisions to strike down laws that would have been valid under the federal Establishment Clause—also, a point Davey does not dispute. Pet. at 18-21.

Courts have also rejected free exercise challenges to the application of these stricter state constitutional provisions. Pet. at 21-22. Davey does not dispute this point except to argue that *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973), *affirmed*, 419 U.S. 888 (1974), is distinguishable. Davey claims that *Luetkemeyer* upheld the state's refusal to provide bus transportation because "the state denied the benefit to students because they are enrolled in a nonpublic school . . . *not* because they were enrolled in a nonpublic *religious* school". Br. Opp. at 10.

This characterization of the court's reasoning is not accurate. One of the plaintiffs' claims in *Luetkemeyer* was that the constitution "requires that all services, specifically, bus transportation, which the State may decide to furnish public school pupils

must also be furnished parochial school pupils". *Luetkemeyer*, 364 F. Supp. 384. The court ruled that the state constitutional provision that prohibited paying for bus transportation for students attending religious schools did not violate the Free Exercise Clause. According to *Luetkemeyer*, the "Supreme Court has clearly indicated that there is an area of activity which falls between the Establishment Clause and the Free Exercise Clause in which action by a State will not violate the former, nor inaction, the latter". *Luetkemeyer*, 364 F. Supp. at 386. The holding in *Luetkemeyer* is at odds with the decision below. Under the majority's reasoning in the decision below there is no such area between the Establishment Clause and the Free Exercise Clause.

This is an important national question that requires this Court's review.

4. This Case Is A Good Candidate For Review

Davey argues that this case is a poor candidate for review. Br. Opp. at 16-18. Davey claims that the restriction on the scholarship program prohibits the declaration of a religious major rather than the use of public funds to pay for religious instruction. Davey sets out several hypothetical applications of the restriction which he labels as arbitrary. This argument is not well taken because it is based on speculation rather than the facts of this case. In this case, Davey was ineligible

for the scholarship because he was pursuing a degree in theology—that is a degree that inherently includes religious education. Davey made it clear in his deposition that he was pursuing a degree in theology and that he understood what that meant in the context of the curriculum at Northwest College.[1]

The Washington Constitution and applicable statutes prohibit the state from paying for Davey's religious instruction. The straightforward question presented is whether the Free Exercise Clause requires Washington to fund Davey's religious instruction when it provides scholarships for secular

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[1] Q At that time, did you dispute whether the pastoral studies major was pursuing a degree in theology, as that applies to the Promise Scholarship?

A [Davey:] No, I did not dispute that.

Q Do you dispute that at this time?

A [Davey:] No, I don't.

. . . .

Q Did you have any difficulty coming to that general understanding of what pursuing a degree in theology meant to you?

A [Davey:] No. From my understanding of what the State would consider to be church related or theology related and looking at what Northwest's program entailed, I felt that I understood what the State was getting at by saying that program wouldn't be covered by the scholarship

Dep. Davey at 33-34, ER at 38:19, 20.

instruction. The Court should grant review to resolve this question.

5. Conclusion

For the foregoing reasons and the reasons stated in the petition, the writ of certiorari should be granted.

Respectfully submitted.

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In The
Supreme Court of the United States

GARY LOCKE, Governor, individually and in his official capacity; MARCUS S. GASPARD, individually, and in his official capacity as Executive Director of the Higher Education Coordinating Board; BOB CRAVES, individually, and in his official capacity as Chair of the Higher Education Coordinating Board; JOHN KLACIK, individually, and in his official capacity as Associate Director of the Higher Education Coordinating Board,

Petitioners,

v.

JOSHUA DAVEY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE INSTITUTE FOR JUSTICE AND THE CENTER FOR EDUCATION REFORM AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

The Institute for Justice is a 501(c)(3) nonprofit, public interest law firm dedicated to protecting individual liberties. One of the core areas on which the Institute focuses its activities is the promotion of parental choice in education. Since its founding 12 years ago, the Institute has participated in the defense of every parental choice program passed by the various state legislatures, usually by representing as defendant-intervenors parents of schoolchildren attending schools using scholarships/vouchers made available under these programs. The Institute has also represented parents seeking to send their children to religious schools under the longstanding parental choice programs of Maine and Vermont, which have excluded families choosing such schools since 1961 and 1981, respectively. In both sorts of cases, a primary legal issue has been whether the inclusion of parental options to choose a religious school for their children to attend comports with the federal and state constitutions' religion clauses.

For example, the Institute for Justice represented five families using scholarships made available by the Cleveland Pilot Scholarship Program to attend religious schools, a practice challenged first in the Ohio courts and then in the federal courts, culminating in last June's upholding of

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[1] Counsel for the parties have consented to the filing of this brief, and copies of letters indicating that consent are filed with this brief. Counsel for the parties did not author this brief in whole or in part. No person or entity, other than *amici curiae* Institute for Justice and Center for Education Reform, their members, and their counsel, made a monetary contribution to the preparation and submission of this brief.

the inclusion of the religious school option in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). During the state court phase of that litigation, the Ohio Supreme Court had upheld the constitutionality of the program under the "compelled support" clause of the Ohio Constitution, as well as under the Establishment Clause. *See Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999). Similarly, in another case in which the Institute represented participating parents, the Wisconsin Supreme Court upheld the Milwaukee scholarship program against challenges that it violated the Wisconsin Constitution's "compelled support" clause and "Blaine Amendment" by allowing parents to choose religious schools, as well as rejecting an Establishment Clause challenge. *See Jackson v. Benson*, 578 N.W.2d 602 (Wisc.), *cert. denied*, 525 U.S. 997 (1998).

With this Court's resolution of the constitutionality of including religious school options under the Establishment Clause, the opponents of the inclusion of such options are left with reliance on state religion clauses. Many state supreme courts have, unlike those of Ohio and Wisconsin, held that their religion clauses prohibit what the federal Constitution now clearly permits, the inclusion of religious school options among parents' choices. This has occurred both in scholarship/voucher-type programs and in other sorts of educational programs where this Court has upheld the inclusion under federal religion clause principles.

In order to ensure that parental choice programs consistent with the federal Constitution can be available in all states that wish to enact them, the Institute has begun a campaign to clarify that these state religion clauses infringe on federally-protected rights under the federal religion clauses, the Free Speech Clause, and the Equal Protection Clause. It is in pursuit of that objective

that the Institute for Justice offers this *amicus* brief in support of Petitioner's efforts to obtain review by this Court of the Ninth Circuit's decision in *Davey v. Locke*, 299 F.3d 748 (9th Cir. 2003). We have informed both Petitioner and Respondent, however, that were this Court to grant certiorari, we would seek to participate as *amicus curiae* in support of Respondent's position on the merits, *i.e.*, that the Ninth Circuit correctly held that Washington State's Blaine Amendment infringed Respondent's Free Exercise of Religion rights by mandating the denial of a scholarship because he chose to study theology at a religious college.[2]

The Center for Education Reform is a national, independent, non-profit advocacy organization founded in 1993 that advances programs and practical information to improve quality K-12 education and provides guidance and support to parents and teachers, community and civic groups, policymakers, grassroots leaders, and all other interested citizens who are working to bring fundamental reform to their schools. CER joins the *amici* brief in this case as a continuation of its commitment to ensure that parents are given and have equal access to quality education programs.

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[2] Indeed, the Institute for Justice's interest is more concrete and immediate than simply our overall objective of reining in overbroad interpretations of state religion clauses. We currently represent several individuals in Washington State who have filed suit challenging the policy of certain Washington public higher education institutions that refuse to allow students to do their student teaching or administrative internships in religious schools while allowing them to perform them in nonreligious private schools.

Last year, CER filed an *amicus* brief on behalf of more than two dozen other education and civic groups in *Zelman* because of the importance of parents, not systems, in determining the best education for their children. CER supports the Court's resolution in *Zelman* that was based on this notion. CER's interest in the *Locke* case is based on the practical reality that state religion clauses, like the one at issue here, prevent parents from one important form of education that should be equally available to them, namely, that of accessing religious education options that were held to be legally permissible according to this court's ruling in *Zelman*. The restrictive nature of the religion clause in Washington's Constitution discriminates against the families that would use state monies to independently choose a religious education to address the educational needs of themselves or their children.

In the context of ensuring that state monies be spent to provide educational opportunities to children, it is important to distinguish between the state's mandate of allowing funds to go only to schools it deems appropriate and schools that can succeed in accomplishing that which the state set out to accomplish in making education a right under its constitution. For parents to be able to participate in the education of their children, they need latitude in making decisions about where to direct state-authorized monies, as affirmed in *Zelman*. CER joins with fellow *amici* in urging this Court to grant the writ and provide the state and federal courts with guidance on the need to protect federal rights under the First and Fourteenth Amendments.

SUMMARY OF THE ARGUMENT

The issue of whether interpretations of state religion clauses such as Washington's Blaine Amendment conflict with federal constitutional rights arises frequently and has engendered a wide array of conflicts demanding resolution by this Court. The Ninth Circuit's decision below in *Davey v. Locke* conflicts directly with the Washington Supreme Court's resolution of the identical issue in *Witters v. Washington Comm'n for the Blind*, 771 P.2d 1119 (Wash.), *cert. denied*, 493 U.S. 850 (1989). It also conflicts with recent decisions of the First Circuit in *Strout v. Albanese*, 178 F.3d 57 (1st Cir.), *cert. denied*, 528 U.S. 931 (1999); and of the supreme courts of Maine, *Bagley v. Raymond School Dep't*, 728 A.2d 127 (Me.), *cert. denied*, 528 U.S. 947 (1999); Vermont, *Chittenden Town Sch. Dist. v. Dep't of Ed.*, 738 A.2d 539 (Vt.), *cert. denied*, 528 U.S. 1066 (1999); and Puerto Rico, *Association de Maestros v. Torres*, 137 D.P.R. 528, 1994 PR Sup. LEXIS 341 (1994). In addition, there are many cases in which state supreme courts have interpreted their constitutions' religion clauses in ways that conflict with recent precedents of this Court interpreting the Free Exercise and Free Speech Clauses.

Taken all together, these various interpretations have caused widespread deprivations of fundamental federal constitutional rights. In the mistaken belief that it is permissible for them to interpret their state constitutional religion clauses in a more restrictive fashion than this Court has interpreted the Establishment Clause, state supreme courts and attorneys general have failed to understand the interplay of the Establishment and Free Exercise Clauses and the extent to which those clauses mandate a neutral stance towards religion by all levels of government, federal, state, and local. While in several of

its cases this Court has refused to allow these state constitutional interpretations to justify clear violations of federal standards, *see, e.g.*, *Widmar v. Vincent*, 454 U.S. 263 (1981), states will continue to discriminate against religion until this Court issues a definitive decision telling the states that their broad interpretations violate the religious neutrality mandated by the federal Constitution.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION BELOW IN *DAVEY* CONFLICTS WITH THE WASHINGTON SUPREME COURT'S DECISION IN *WITTERS*.

In 1986 this Court issued that rarest of all decisions, a unanimous decision interpreting the Establishment Clause. In *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986), this Court held that the Establishment Clause was not violated by a program that permitted Larry Witters to use state-supplied vocational rehabilitation funds to attend a religious college to pursue training to become a religious worker.[3] Finding that "[a]ny aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients," this Court concluded that "it does not seem appropriate to view any aid ultimately flowing to the Inland School of the Bible as resulting from a *state* action sponsoring or subsidizing religion." *Id.* at 488. Having

[3] The private Christian college Witters was attending prepared its graduates to be pastors, missionaries, or youth directors.

overruled the Washington Supreme Court's contrary decision on the Establishment Clause, this Court remanded the case to the Washington Supreme Court for it to consider the (in the Washington Supreme Court's words) "'far stricter' dictates of the Washington State Constitution." *Id.* at 489 (*quoting Witters v. Commission for the Blind*, 102 Wash. 2d 624, 626, 689 P.2d 53, 55 (1984)).

On remand, the Washington Supreme Court again ruled against Witters, this time in a 4-3 decision in which the dissenters argued that the majority's interpretation of Washington's Blaine Amendment, Article I, section 11, violated Witters' rights under the Free Exercise Clause. *Witters v. Washington Commission for the Blind*, 771 P.2d 1119 (Wash. 1989). Mr. Witters again petitioned this Court for review, but this time the Court denied certiorari. 493 U.S. 850 (1989). Washington State has continued to interpret its Blaine Amendment to require the exclusion of religious schools from programs where the beneficiaries choose the schools they wish to attend.[4] This non-neutral interpretation has led the state to deny Respondent Davey the "Promise Scholarship" to which he is otherwise entitled because he desires to use it in pursuing a major in Pastoral Studies at Northwest College, an accredited institution affiliated with the Assembly of God, and clearly what this Court used to call a "pervasively sectarian institution."

The Ninth Circuit's decision holding that Washington's denial of the Promise Scholarship violates Davey's rights under the Free Exercise Clause is thus in direct

[4] See footnote 2, *infra*.

conflict with the Washington Supreme Court's opposite conclusion with respect to the Free Exercise Clause in its *Witters* decision. Indeed, it was this Court's refusal to review that *Witters* decision that has set the stage for this conflict, and for Washington State to continue denying the federal constitutional rights of individuals such as Davey. Only a decision on the merits by this Court can resolve this conflict.

II. THE NINTH CIRCUIT'S DECISION IN *DAVEY* CONFLICTS WITH DECISIONS OF THE FIRST CIRCUIT AND THE SUPREME COURTS OF MAINE, VERMONT, AND PUERTO RICO.

At least four appellate courts subordinate to this Court have ruled in similar cases that the exclusion of the choice of religious options from a program allowing the program's beneficiaries to make a free and independent choice of educational provider does not violate the Free Exercise Clause. One appellate court, like the Ninth Circuit below, has concluded that such an exclusion does in fact violate the Free Exercise Clause. In the aftermath of this Court's decision upholding the Cleveland Pilot Scholarship program in *Zelman v. Simmons-Harris*, one can expect this issue to arise with increasing frequency as state legislatures consider parental-choice programs to address the chronic and continuing crisis in American public education.[5]

[5] The legislatures of Colorado, Louisiana, New Hampshire, and Texas are currently considering legislative proposals for parental-choice programs.

In *Strout v. Albanese*, 178 F.3d 57, *cert. denied*, 528 U.S. 931 (1999), the First Circuit rejected the plaintiffs' arguments that the Free Exercise Clause forbade Maine's exclusion of parents' ability to choose an otherwise eligible religious school for their children's education. Under Maine's tuitioning system, school districts that choose not to operate public schools for some or all grades must pay tuition to public schools operated by other districts or private schools on behalf of their resident students. The children's parents have the responsibility of selecting the schools their children attend, but since 1981 Maine has excluded religious schools from those parents can select. Although Maine's exclusion was due to a now clearly erroneous reading of the Establishment Clause, while Washington's similar action is based on its Blaine Amendment, in both cases the courts rejected the argument that the Free Exercise Clause mandated equal treatment of religious options, a position diametrically opposed to that of the Ninth Circuit in *Davey*.

In a lawsuit parallel to *Strout*, the Maine Supreme Judicial Court had earlier considered the same question involving the tuitioning system, and held that the Free Exercise Clause did not require the inclusion of religious private schools among the private schools parents could choose. *See Bagley v. Raymond School Dep't*, 728 A.2d 127, *cert. denied*, 528 U.S. 947 (1999). It, too, concluded that the Establishment Clause required the State to eliminate that option, relying on this Court's decision in *Committee for Public Education v. Nyquist,* 413 U.S. 756 (1973), rather than the later Establishment Clause cases this Court looked to in the *Zelman* case.

Shortly after the First Circuit decided *Strout* and the Maine Supreme Court decided *Bagley*, the Vermont

Supreme Court addressed the question of whether parents could be denied the option of choosing religious schools under its tuitioning system. For all intents and purposes, the Vermont system is the same as Maine's, but in 1994 in *Campbell v. Manchester Bd. of Sch. Dirs.*, 641 A.2d 352 (1994), the Vermont Supreme Court had anticipated this Court's decision in *Zelman* and held that the Establishment Clause did not require that parents be denied the opportunity of choosing otherwise eligible religious schools. Five years later, after a school district challenged the Vermont Department of Education's refusal to let the district pay tuition for students attending such a school, the Vermont Supreme Court reinterpreted its "compelled support" religion clause[6] in its state constitution to forbid the payments. *See Chittenden Town Sch. Dist. v. Dep't of Education*, 738 A.2d 539, *cert. denied*, 528 U.S. 1066 (1999). The Vermont Supreme Court summarily rejected the arguments of the district and intervening parents with children attending a religious school that the Free Exercise Clause was violated by the unequal treatment of the religious option. *Id.* at 563. The Vermont decision demonstrates that compelled support clauses, like the Blaine Amendments in the constitutions of Washington and so many other states, are also susceptible of interpretations more restrictive than the Establishment Clause that infringe federal constitutional rights protecting religious liberty.

[6] Article I, section 3 of the Vermont constitution states that "no person ought to . . . be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of conscience." Similar provisions are found in 28 other state constitutions.

Like Washington State, the Commonwealth of Puerto Rico has a Blaine Amendment in its constitution, and for the same reason, the U.S. Congress required it to include the Amendment through enabling legislation.[7] In 1994, the Supreme Court of Puerto Rico used its Blaine Amendment to invalidate an innovative school choice program because it permitted parents to use scholarships to send their children to religious schools, among others, in much the same way Washington refuses to allow students to use Promise Scholarships to pursue theology degrees from religious colleges. The Puerto Rico Supreme Court held that the scholarships constituted aid to the private schools, even though they are plainly aid to the families. While the Maine and Vermont tuitioning systems continue without the participation of religious schools, the Puerto Rico program was terminated in its entirety by the Puerto Rico Supreme Court.

We also note that a trial court in Florida recently held that Florida's Opportunity Scholarship Program violates Florida's Blaine Amendment by including religious schools. *See Holmes v. Bush*, Case No. CV 99-3370, Leon County Circuit Ct. (Aug. 5, 2002). Under Florida's program, parents with children in failing public schools are offered scholarships they can use to transfer to non-failing public schools or participating private schools. The trial court concluded that because parents could choose religious schools the program was unconstitutional aid to the religious schools. The appeal of this decision was heard by the Florida District Court of Appeal on March 18, 2003,

[7] See the Puerto Rico Federal Relations Act (also known as "the Jones Act"), 39 Stat. 951 (1917).

and a decision is pending. The trial court ignored the state and parents' arguments that to exclude the option of selecting a religious school discriminated based upon religion under the federal Constitution.

Lining up with the Ninth Circuit, the Eighth Circuit has decided a similar issue. In *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998), the defendants refused to provide paraprofessional services on site to disabled students enrolled in sectarian schools, while providing such services on site in nonsectarian private schools. By singling out those families who selected a sectarian school for their children's education, the state of Minnesota drew a line based upon religion. Finding no justification for excluding children in religious schools from the benefits of the program, the Eighth Circuit held that the state statute and corresponding policies violated the plaintiffs' rights to free exercise of religion, free speech, and equal protection of the laws. Thus, the Eighth Circuit stands with the Ninth Circuit in conflicting with the decisions of the First Circuit and Washington, Maine, Vermont, and Puerto Rico supreme courts.

III. MANY OTHER STATES BESIDES WASHINGTON HAVE INTERPRETED THEIR STATE CONSTITUTIONS' RELIGION CLAUSES AS IMPOSING A MORE RESTRICTIVE STANDARD THAN THE ESTABLISHMENT CLAUSE DOES.

The decisions of the supreme courts of Washington (*Witters*), Vermont (*Chittenden*), and Puerto Rico (*Maestros*)[8] are the tip of an iceberg of state decisions holding that state constitutional religion clauses prohibit the inclusion of religious school options in programs where the Establishment Clause permits the inclusion. *Davey*'s holding that the Free Exercise Clause is violated by excluding the choice of religious schools solely because they are religious puts it in conflict with these decisions as well. In two areas where this Court has upheld including individuals selecting religious schools on an equal basis – transportation subsidies and textbook loans – numerous state supreme courts have struck down their legislatures' efforts to enact similar legislation.

This Court's modern Establishment Clause jurisprudence began in 1947 with *Everson v. Board of Ed.*, 330 U.S. 1 (1947), in which this Court upheld a New Jersey statute providing transportation subsidies for all schoolchildren, including those attending religious schools. Applying a "child benefit" theory that the religiously-neutral subsidies aided the children and their families rather than the schools, this Court intimated that to have

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[8] We do not include the Maine Supreme Judicial Court on this list because its decision in *Bagley* did not involve its religion clause but rather an erroneous interpretation of the Establishment Clause as permitting the exclusion of the choice of religious schools.

excluded families because they had selected a religious school for their children would have violated their free exercise rights. 330 U.S. at 16.[9] Notwithstanding this Court's clear enunciation of a standard of religious neutrality as a key interpretive principle under the First Amendment, numerous state supreme courts proceeded to interpret their state constitutions' religion clauses to exclude transportation benefits for families selecting religious schools for their children's education.

The earliest post-*Everson* state court decision[10] disallowing the transporting of students to religious schools under a state religion clause came from Washington in

[9] The Court said in this regard that:

> New Jersey cannot consistently with the "establishment of religion" clause contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the [First] amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion.
>
> * * *
>
> That Amendment requires the state to be a neutral in its relationship with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used to handicap religions as it is to favor them.

Id. at 16-18.

[10] In our discussions of the transportation and textbook cases we include only post-*Everson* and post-*Allen* decisions because in those cases it is clear that the state courts are applying more restrictive interpretations than that given by this Court under the Establishment Clause. There are a number of pre-*Everson* and pre-*Allen* cases holding that state constitutional religion clauses prohibit participation by those choosing religious schools, but because this Court had not yet ruled on the federal question, the state courts were not knowingly deviating from federal precedent.

Visser v. Nooksack Valley School Dist., 207 P.2d 198 (Wash. 1949). *Visser* was followed by similar decisions in Missouri, *McVey v. Hawkins*, 258 S.W.2d 927 (Mo. 1953); Alaska, *Matthews v. Quinton*, 362 P.2d 932 (Alaska 1961); Wisconsin, *State ex rel. Reynolds v. Nussbaum*, 115 N.W.2d 761 (Wisc. 1962); Oklahoma, *Board of Ed. v. Antone*, 384 P.2d 911 (Okla. 1963); Delaware, *Opinion of the Justices*, 216 A.2d 668 (Del. Sup. 1966); Hawaii, *Spears v. Honda*, 449 P.2d 130 (Haw. 1968); and Idaho, *Epeldi v. Engelking*, 488 P.2d 860 (Idaho 1971). In all these decisions the state courts interpreted their constitutions to prohibit inclusion of religious school students in programs permitted by the federal religion clauses.

In 1968, in *Board of Ed. v. Allen*, 392 U.S. 236 (1968), this Court upheld a New York program providing for loans of secular textbooks to all students, including those enrolled in religious schools. Thereafter, as occurred with the transportation programs, a number of state supreme courts interpreted their religion clauses to be more restrictive than the federal religion clauses. *Gaffney v. Dep't of Ed.*, 220 N.W.2d 550 (Neb. 1974); *Pastor v. Tussey*, 512 S.W.2d 97 (Mo. 1974); *McDonald v. School Bd.*, 246 N.W.2d 93 (S.D. 1976); *Bloom v. School Comm.*, 379 N.E.2d 578 (Mass. 1978); *California Teachers Ass'n v. Riles*, 632 P.2d 953 (Cal. 1981); and *Fannin v. Williams*, 655 S.W.2d 480 (Ky. 1983). Once again, these state supreme courts were interpreting their state religion clauses more restrictively to prohibit the inclusion of families using religious schools from a generally available benefit program that was permissible under the First Amendment.

IV. THIS COURT'S INTERPRETATION OF THE FIRST AMENDMENT DOES NOT PERMIT STATE COURTS TO APPLY MORE RESTRICTIVE INTERPRETATIONS OF STATE RELIGION CLAUSES TO EXCLUDE PERSONS FREELY CHOOSING RELIGIOUS OPTIONS.

Some members of this Court have noted that state Blaine Amendments are not a benign expression of a desire for a stricter separation of church and state.[11] Rather, they are a shameful legacy of this Nation's Protestant majority's historical anti-Catholic bigotry. Just as Massachusetts enacted the first proto-Blaine amendment in 1854[12] when the nativist, anti-immigrant Know-Nothing Party took control of the Massachusetts state government,[13] the bulk of state Blaine Amendments were enacted beginning in the mid-to-late 1870's during another wave of anti-Catholic sentiment occasioned in part by efforts of the Catholic Church to obtain funding for its schools equal to that provided to the then-nondenominationally Protestant public schools.[14] While the federal Blaine Amendment narrowly failed to obtain the two-thirds majorities required to amend the federal constitution, the anti-Catholic

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[11] See Justice Thomas' plurality opinion in *Mitchell v. Helms*, 530 U.S. 793, 828 (2000), where he says "hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. . . . Consideration of the [Blaine] amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.'"

[12] Article XVIII was adopted by the legislatures of 1854 and 1855, and approved and ratified by the people in 1855.

[13] Mulkern, *The Know-Nothing Party in Massachusetts* 76 (1990).

[14] See generally Jorgenson, *The State and the Non-Public School: 1825-1925* (1987).

Republican majorities in both houses of Congress had more than enough votes to require through enabling legislation that new applicants for statehood put Blaine Amendments into their state constitutions. Washington's Blaine Amendment, which led the state to take away Respondent Davey's Promise Scholarship when he declared a religious major at a religious college, is a typical example of such an Amendment, required by the Act of Feb. 22, 1889, 25 Stat. 676, ch. 180 (1889), the enabling legislation for the admission of South Dakota, North Dakota, Montana, and Washington. Other states with Blaine Amendments in their constitutions have relied on those provisions to justify excluding religious groups from otherwise neutral government programs. For example, Missouri offered its Blaine Amendment as a compelling interest in seeking to justify the exclusion of religious groups from equal treatment with non-religious groups offered free meeting space at the University of Missouri. Finding no Establishment Clause problem with providing that space on an equal basis, this Court rejected the Blaine Amendment as a defense in *Widmar v. Vincent*, 454 U.S. 263 (1981). Similarly, in *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), this Court held that the state university could not exclude student publications with religious viewpoints from a program providing publication subsidies to all other student publications from student activities fees. This Court noted that its decision was consistent with a line of cases running from *Widmar* through *Board of Ed. v. Mergens*, 496 U.S. 226 (1990), and *Lamb's Chapel v. Center Moriches Union Sch. Dist.*, 508 U.S. 384 (1993), and continued, in *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001).

When states like Washington and Vermont rely on state religion clauses to exclude students from benefit programs based solely on their having freely chosen a religious provider, they violate the Free Exercise rights of believers, as well as their rights to free speech and equal protection of the laws. As this Court said in *Rosenberger* about its initial foray into the Establishment Clause in *Everson*:

> There we cautioned that in enforcing the prohibition against laws respecting establishment of religion, we must 'be sure that we do not inadvertently prohibit [the government] from extending its general state law benefits to all its citizens regardless of their religious belief.' [*Citing Everson*, 330 U.S. at 16] We have held that the ***guarantee of neutrality*** is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.

Rosenberger, 515 U.S. at 839 (emphasis added). As the foregoing discussion of the conflicts between the Ninth Circuit's correct decision in *Davey v. Locke* below and a plethora of decisions by other appellate courts, both state and federal, demonstrates, many courts feel free to discriminate against religious options. The time is overdue for this Court to resolve these conflicts and instruct the lower courts that the federal Constitution's command of religious neutrality cannot be undermined by interpretations of state religion clauses that violate religious liberty.

CONCLUSION

Amici respectfully urge this court to grant Petitioner's request for a grant of certiorari.

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GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, ET AL.,

Petitioners,

v.

JOSHUA DAVEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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Order of the United States District Court for the Western District of Washington, October 26, 2000 ..... 50a

Order of the United States Court of Appeals for the Ninth Circuit Denying Petition for Rehearing and Rehearing En Banc, November 26, 2992 ..... 86a

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RELEVANT DOCKET ENTRIES

U.S. District Court
U.S. District Court -- Western Washington (Seattle)

CIVIL DOCKET FOR CASE #: 00-CV-61

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Proceedings include all events. — REOPEN
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1/13/00	1	COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELEIF [sic] AND DAMAGES JURY DEMAND [Entry date 01/18/00]
2/2/00	8	ANSWER to complaint [1-1] by defendants [Entry date 02/04/00]
2/10/00	10	MOTION by plaintiff for preliminary injunction; OA REQ'D NOTED FOR 3/3/00
3/21/00	25	ORDER by Judge Barbara J. Rothstein DENYING pltf's motion for preliminary injunction [10-1]
7/24/00	36	MOTION by defendants for summary judgment of dismissal NOTED FOR 8/18/00 [Entry date 07/27/00]

7/24/00 39 MOTION by plaintiff for summary judgment; OA REQ'D NOTED FOR 8/18/00 [Entry date 07/27/00]

10/5/00 63 ORDER by Judge Barbara J. Rothstein DENYING pltf's motion for summary judgment [39-1] and GRANTING dfts' motion for summary judgment of dismissal [36-1]

10/6/00 64 JUDGMENT: by Judge Barbara J. Rothstein - Davey's mtn for sum jgmt is DENIED and HECB's mtn for sum jgmt is GRANTED.
As a matter of law, HECB is entitled to complete dismissal of Davey's complaint
Entered on: 10/6/00

10/26/00 65 NOTICE OF APPEAL by plaintiff Joshua Davey from Dist. Court decision [64-2], [63-1] [Entry date 10/27/00]

10/26/00 66 MOTION by plaintiff Joshua Davey for injunction pending appeal NOTED FOR 11/10/00 [Entry date 10/27/00]

11/21/00 74 ORDER by Judge Barbara J. Rothstein DENYING pltf's motion for temporary injunction [66-1]. The court accepts HECB's offer to set aside $1542 during the pendency of Davey's appeal, which shall be paid to Davey upon court order in the event that he prevails on appeal [Entry date 11/22/00]

US Court of Appeals for the Ninth Circuit
Case Summary

Court of Appeals Docket #: 00-35962 Filed: 11/9/00
Nsuit: 3440 Other civil rights (Fed)
Davey v. Locke, et al
Appeal from: Western District of Washington (Seattle)

Lower court information:
District: 0981-2 : CV-00-00061-BJR
presiding judge: Barbara J. Rothstein, Chief Judge

7/18/02 FILED OPINION: REVERSED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Pamela A. RYMER, author; M. M. McKEOWN, dissenting; Ronald M. GOULD.) FILED AND ENTERED JUDGMENT. [00-35962]

11/26/02 Filed order (Pamela A. RYMER, M. M. McKEOWN, Ronald M. GOULD,): ...The petition for rehearing and the petition for rehearing en banc are DENIED. [00-35962]

5/23/03 Received notice from Supreme Court, petition for certiorari GRANTED on 5/19/03. Supreme Court No. 02-1315

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOSHUA DAVEY, Plaintiff, v. GOVERNOR GARY LOCKE, individually and in his official capacity; MARCUS S. GASPARD, individually, and in his official capacity as Executive Director of the Higher Education Coordinating Board; BOB CRAVES, individually, and in his official capacity as Chiar of the Higher Education Coordinating Board; JOHN KLACIK, individually, and in his official capacity as Assocaite Director of the Higher Education Coordinating Board, Defendants.	NO. C00-0061 VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND DAMAGES JURY DEMAND

Comes now the plaintiff, JOSHUA DAVEY, and sues Defendants for violating his federal and state constitutional rights by denying him eligibility for the State of Washington's Promise Scholarship solely because he is pursuing a degree in pastoral studies.

I. JURISDICTION

1. This action arises under the United States Constitution, particularly the First and Fourteenth

Amendments; under federal law, particularly 28 U.S.C. § 2201 and 42 U.S.C. §§ 1983 and 1988; and under the Constitution of the State of Washington, particularly Article I, Sections 5 & 11.

2. This Court is vested with original jurisdiction over these federal claims by operation of 28 U.S.C. §§ 1331, 1343 and 1367, and has supplemental jurisdiction pursuant to 28 U.S.C. § 1367 to hear claims arising under the Washington Constitution.

3. This Court is vested with authority to grant the requested declaratory judgment by operation of 28 U.S.C. §§ 2201, *et seq.*

4. This Court is authorized to issue the requested injunctive relief pursuant to Rule 65 of the Federal Rules of Civil Procedure.

5. This Court is authorized to award the requested damages pursuant to 28 U.S.C. [sic] 1343(4).

6. This Court is authorized to award attorneys fees pursuant to 42 U.S.C. § 1988.

II. VENUE

7. Venue is proper in the United States District Court for the Western District of Washington under 28 U.S.C. § 1391(b), in that a substantial part of the events giving rise to the claim occurred within the district.

III. IDENTIFICATION OF PLAINTIFF

8. Plaintiff Joshua Davey is an [sic] nineteen year old resident of the State of Washington, King County, and the City of Kirkland.

9. Mr. Davey is a student at Northwest College in the City of Kirkland.

10. Mr. Davey is majoring in Pastoral Ministries and Business Management and Administration.

11. Mr. Davey has chosen Pastoral Ministries as his major pursuant to his sincerely held religious beliefs.

IV. IDENTIFICATION OF DEFENDANTS

12. Defendant Governor Gary Locke is governor of the State of Washington and is being sued in his individual and official capacities. Upon information and belief, Governor Locke resides in Olympia, Washington.

13. Marcus S. Gaspard is the Executive Director of the State of Washington's Higher Education Coordinating Board and is being sued in his individual and official capacities. Upon information and belief, Mr. Gaspard resides in Puyallup, Washington.

14. Bob Craves is the Chair of the State of Washington's Higher Education Coordinating Board and is being sued in his individual and official capacities. Upon information and belief, Mr. Craves resides in Redmond, Washington.

15. John Klacik is the Associate Director of the State of Washington's Higher Education Coordinating Board and is being sued in his individual and official capacities. Upon information and belief, Mr. Klacik resides in Olympia, Washington.

V. FACTUAL ALLEGATIONS

16. Mr. Davey learned of the State of Washington's Promise Scholarship as a high school senior in 1999.

17. The Promise Scholarship subsidizes the post-secondary education expenses of Washington residents coming from low and middle-income families, and who graduated from high school in the top 10 percent of their class.

18. Any Washington resident meeting these criteria and enrolled in an accredited public or private post-secondary institution within Washington qualifies for the scholarship.

19. The Promise Scholarship awards up to $1,585 per academic year through June 30, 2001. The actual amount of the scholarship varies by the number of recipients.

20. In 1999, the amount was $1,125 per year.

21. Students enrolled in private institutions receive the funds directly from the state via a warrant. The warrant is made out to the recipient and sent to the institution to confirm enrollment. Once enrollment is confirmed, the institution gives the warrant to the student.

22. The student may expend the Promise Scholarship funds on any education-related expense.

23. Selection of the institution that will receive the Promise Scholarship funds is entirely the private choice of the recipient.

24. Mr. Davey qualified for the scholarship under the neutral financial and academic criteria, and made timely application for the scholarship.

25. Mr. Davey's sincerely held religious beliefs require him to prepare for the ministry through studying theology.

26. In August, 1999, the Executive Director of the Washington State Higher Education Coordinating Board ("HECB"), Marcus S. Gaspard, notified Mr. Davey that he was eligible for the scholarship.

27. That same month, Mr. Davey enrolled at Northwest College with a double major in Pastoral Ministries and Business Management/ Administration.

28. Northwest is a private Christian college in Kirkland, Washington, that offers degrees in both religious and secular fields of study.

29. In October, 1999, Mr. Davey received a certificate and a letter from the Governor, certifying that he had been awarded the scholarship in the amount of $1,125 for the 1999-2000 academic year, and for an amount yet to be determined for 2000-2001.

30. Neither the Governor, nor any other official, advised Mr. Davey that there was any restriction on his choice of school or major, other than the requirement that the school be an accredited Washington school.

31. On October 28, 1999, the director of financial aid at Northwest, Lana Walter, told Mr. Davey that, according to new information from the state, students majoring in theology related fields were ineligible for the Washington Promise Scholarship.

32. Ms. Walter had received a letter from John Klacik, Associate Director of the HECB, dated October 12, 1999, that stated Defendants' new policy as follows: "students who are pursuing a degree in theology are not eligible to receive any state-funded student financial aid, including the new Washington Promise Scholarship." (hereinafter, the "Policy") (attached as "Exhibit A").

33. The letter also stated that future Payment Request Forms would include a certification that scholarship recipients are not pursuing religious studies.

34. Upon information and belief, a check or warrant made out to Mr. Davey for the fall, 1999 semester had already been received by Northwest College.

35. Mr. Davey did not receive this check or warrant or any other funding under the Promise Scholarship program because he was majoring in Pastoral Studies.

36. If Mr. Davey had certified in writing that he would not pursue a theology major, he would have been given the scholarship check.

37. Mr. Davey did not change his major and sign the certificate because it would have violated his sincerely held religious beliefs to do so.

38. Upon information and belief, in addition to Mr. Davey, three other Northwest students who were eligible for the Promise Scholarship decided to pursue a degree in theology.

39. Upon information and belief, two of these students changed their major and obtained the scholarship.

40. Mr. Davey and one other Northwest student would not change their major and lost the scholarship.

41. Mr. Davey's decision not to certify that he was not majoring in theology is expressive conduct intended to affirm his faith and convey his disapproval of the state's policy of religious discrimination.

42. Defendants' knew or should have known that their discrimination against theology majors like Mr. Davey violates the fundamental rights of free exercise, free speech, freedom of association, due process, and equal protection that are protected by the United States and Washington Constitutions.

VI. ALLEGATIONS OF LAW

43. All alleged acts of the Defendants, their officers, agents, servants, employees, or persons acting at their behest or direction, were done and are continuing to be done under the color and pretense of state law, including the statutes, regulations, customs, policies and usages of the State of Washington.

44. Mr. Davey has no adequate or speedy remedy at law to correct or redress the deprivations of his federal and state rights by Defendants.

45. Unless and until the enforcement of the Defendants' Policy prohibiting Promise Scholarship students from studying theology is enjoined, Mr. Davey will suffer and continue to suffer irreparable injury to his federal and state rights.

VII. FIRST CLAIM FOR RELIEF

Violation of the Free Exercise Clause of the First Amendment to the United States Constitution

46. Plaintiff realleges and incorporates herein by reference ¶¶ 1-45 and does further allege as follows:

47. Defendants, through their Policy, burden the free exercise of religion as guaranteed by the First Amendment to the United States Constitution.

48. The Policy, on its face and as interpreted and enforced by the Defendants, burdens Mr. Davey's free exercise right to study theology and pursue a career in the ministry in accordance with his sincerely held religious beliefs.

49. In order to qualify for the Promise Scholarship, Mr. Davey must give up his religious belief to study theology.

50. Defendants discriminate against religious students because only students studying theology are ineligible for the Promise Scholarship.

51. Defendants have no compelling interest in discriminating only against students desiring to study theology in determining eligibility for Promise Scholarships.

52. Defendants' Policy thus constitutes a violation of Plaintiff's rights under the Free Exercise Clause of the First Amendment to the United States Constitution as incorporated and applied to state action under the Fourteenth Amendment because it singles out religious individuals for discriminatory treatment and conditions a government benefit on the forfeiture of fundamental rights.

53. WHEREFORE, Plaintiff respectfully prays that the Court grant the equitable and legal relief set forth hereinafter in the prayer for relief.

VIII. SECOND CLAIM FOR RELIEF

Violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution

54. Plaintiff realleges and incorporates by reference ¶¶ 1-53 and does further allege as follows:

55. The Promise Scholarship is neutrally available to post-secondary education students who are Washington residents, come from low and middle-income families, and graduated from high school in the top 10 percent of their class.

56. Only students pursuing a degree in theology are ineligible for the scholarship, even though they meet the academic and income level requirements.

57. Students similarly situated to Mr. Davey, excepting only that they are not studying theology, are eligible for the Promise Scholarship and have received funding under the scholarship program.

58. Mr. Davey has been treated disparately by Defendants from similarly situated students.

59. The Defendants have no compelling interest in discriminating only against students desiring to study theology in determining eligibility for Promise Scholarships.

60. Defendants' denial to Plaintiff of access to the same neutral government benefits provided other similarly situated students pursuing secular degrees, constitutes a violation of the Plaintiff's equal protection rights as guaranteed by the Fourteenth Amendment to the United States Constitution.

61. WHEREFORE, Plaintiff respectfully prays that the Court grant the equitable and legal relief set forth hereinafter in the prayer for relief.

IX. THIRD CLAIM FOR RELIEF

Violation of the Establishment Clause of the First Amendment to the United States Constitution

62. Plaintiff realleges and incorporates by reference ¶¶ 1-61 and does further allege as follows:

63. The Defendants' Policy is hostile toward, and inhibits, Mr. Davey's particular religious beliefs and exercise.

64. The Establishment Clause affirmatively mandates that Defendants cannot treat Mr. Davey as a second-class citizen merely because he is pursuing his religious conviction to study theology.

65. The Defendants' Policy, denying Mr. Davey access to a government benefit in the form of an education scholarship, on the basis of his religious beliefs and practices, conveys a governmental message that Mr. Davey is an outsider and not a full member of the community, and entangles the State of Washington with religion, both of which contravene the First Amendment Establishment Clause as incorporated and applied to state action under the Fourteenth Amendment.

66. WHEREFORE, Plaintiff respectfully prays that the Court grant the equitable and legal relief set forth hereinafter in the prayer for relief.

X. FOURTH CLAIM FOR RELIEF

Violation of the Free Speech Clause of the First Amendment to the United States Constitution

67. Plaintiff realleges and incorporates by reference ¶¶ 1-66 and does further allege as follows:

68. Defendants' Policy discriminates against the free expression of religious ideas, values, thoughts, viewpoints and opinion on the basis of the content of such expression.

69. The Policy, on its face and as interpreted and enforced by the Defendants, denies eligibility only to students who would otherwise be eligible for the Promise Scholarship, based solely on the content and viewpoint of their educational speech.

70. Mr. Davey's decision to pursue a theological degree is expressive conduct protected by the First Amendment.

71. Mr. Davey has been unconstitutionally denied equal access to government funds generally available to similarly situated students based upon the religious content of his course of study.

72. Mr. Davey has a right to receive the information provided by Northwest's theology program and his choice of education is expressive conduct protected by the First Amendment.

73. Defendants have created a limited public forum by subsidizing private speech through a generally applicable, neutral funding scheme in the form of the Promise Scholarship.

74. Defendants are discriminating on the basis of content and viewpoint when they fund only those who promise not to study for a degree with an explicit religious viewpoint.

75. Defendants have no compelling interest in discriminating only against students desiring to study theology in determining eligibility for Promise Scholarships.

76. Defendants' Policy interferes with free speech protected under the First Amendment to the United States Constitution because it promotes and protects virtually all educational speech while denying assistance to, and thereby inhibiting, the exercise of religious educational speech.

77. WHEREFORE, Plaintiff respectfully prays that the Court grant the equitable and legal relief set forth hereinafter in the prayer for relief.

XI. FIFTH CLAIM FOR RELIEF

Violation of the Right of Freedom of Association Guaranteed by the First Amendment to the United States Constitution

78. Plaintiff realleges and incorporate [sic] by reference ¶¶ 1-77 and does further allege as follows:

79. The desire to associate with those who study and teach theology is protected by the right to freedom of association.

80. Defendants have conditioned eligibility for the Promise Scholarship and the benefits associated with this scholarship upon the forfeiture of the right of freedom of association.

81. Defendants have therefore violated the First Amendment to the United States Constitution.

82. The Defendants have no compelling interest in discriminating only against students desiring to study theology in determining eligibility for Promise Scholarships.

83. WHEREFORE, Plaintiff respectfully prays that the Court grant the equitable and legal relief set forth hereinafter in the prayer for relief.

XII. SIXTH CLAIM FOR RELIEF

Violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution

84. Plaintiff realleges and incorporates herein by reference ¶¶ 1-83 and does further allege as follows:

85. The Policy is unconstitutionally vague. It is impossible to determine what is covered by its prohibitions.

86. "Pursue" is not defined by the Defendants or their Policy.

87. "Theology" is not defined by the Defendants or their Policy.

88. Persons of common intelligence must necessarily guess at the meaning, scope, and application of the terms "pursue" and "theology" as contained in Defendants' Policy.

89. The Policy lacks sufficient standards and is subject to discriminatory enforcement.

90. Defendants' use of this Policy to deny the Plaintiff eligibility for the Promise Scholarship is arbitrary and capricious.

91. The Policy violates the Due Process rights of the Plaintiff as guaranteed by the Fourteenth Amendment to the United States Constitution.

92. WHEREFORE, Plaintiff respectfully prays that the Court grant the equitable and legal relief set forth hereinafter in the prayer for relief.

XIII. SEVENTH CLAIM FOR RELIEF

Violation of the Right of Free Exercise of Religion Guaranteed by the Washington State Constitution, Article I, Section 11

93. Plaintiff realleges and incorporates herein by reference ¶¶ 1-92 and does further allege as follows:

94. Defendants, through their Policy, burden the free exercise of religion as guaranteed by Article I, Section 11 of the Washington Constitution.

95. The actions of the Defendants place a burden on Mr. Davey's free exercise right to study theology and pursue a career in the ministry in accordance with sincerely held religious beliefs.

96. In order to qualify for the Promise Scholarship, Mr. Davey must give up his religious belief to study theology.

97. Defendants single out religious students for discrimination because only students studying theology are ineligible for the Promise Scholarship.

98. Defendants have no compelling interest in discriminating only against students desiring to study religion in determining eligibility for Promise Scholarships.

99. Defendants' Policy thus constitutes a violation of Plaintiff's rights under Article I, Section 11, of Washington's Constitution because it singles out religious individuals for discriminatory treatment and conditions a government benefit on the forfeiture of fundamental rights.

100. WHEREFORE, Plaintiff respectfully prays that the Court grant the equitable and legal relief set forth hereinafter in the prayer for relief.

XIV. EIGHTH CLAIM FOR RELIEF

Violation of the Right of Free Speech Guaranteed by the Washington State Constitution, Article I, Section 5

101. Plaintiff realleges and incorporates by reference ¶¶ 1-100 and does further allege as follows:

102. Defendants' Policy discriminates against the free expression of religious ideas, values, thoughts, viewpoints and opinion on the basis of the content of such expression.

103. This Policy, as interpreted and enforced by the Defendants, denies eligibility to students who would otherwise be eligible for the Promise Scholarship, based solely on the content and viewpoint of their educational speech.

104. Mr. Davey's decision to pursue a theological degree is expressive conduct protected by Article I, Section 5.

105. Mr. Davey has a right to receive the information provided by Northwest's theology program and his choice of education is expressive conduct protected by the First Amendment.

106. Defendants have created a limited public forum by subsidizing private speech through a generally applicable, neutral funding scheme in the form of the Promise Scholarship.

107. Defendants are discriminating on the basis of content and viewpoint when they fund only those

who promise not to study for a degree with an explicit religious viewpoint.

108. Defendants have no compelling interest in discriminating only against students desiring to study theology in determining eligibility for Promise Scholarships.

109. Defendants' Policy interferes with free speech protected by Article I, Section 5 of the Washington Constitution insofar as it promotes and protects virtually all educational speech while denying assistance to, and thereby inhibiting, the exercise of religious educational speech.

110. WHEREFORE, Plaintiff respectfully prays that the Court grant the equitable and legal relief set forth hereinafter in the prayer for relief.

XV. PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests the following relief:

A. That this Court enter a declaratory judgment stating that Defendants' policy of denying Promise Scholarship eligibility to those students who are pursuing a degree in theology is a facially unconstitutional violation of the Plaintiff's rights as guaranteed under the First and Fourteenth Amendments to the United States Constitution, as well as Article I, Sections 5 & 11 of the Constitution of the State of Washington;

B. That this Court enter a declaratory judgment stating that the Defendants' application of the Policy to deny Promise Scholarship eligibility to Plaintiff because of the religious beliefs and the viewpoint and content of Plaintiff's educational speech violates the Plaintiff's rights as guaranteed under the First and Fourteenth Amendments to the United States Constitution, as well as Article I, Sections 5 & 11 of the Constitution of the State of Washington;

C. That this Court enjoin Defendants from unconstitutional and discriminatory exclusion of Plaintiff from eligibility for the Promise Scholarship;

D. That this Court award damages in an amount to be determined by the finder of fact in accordance with the proof, plus interest at the legal rate until paid;

E. That this Court award Plaintiff's costs and expenses of this action, including a reasonable attorneys fee award, in accordance with 42 U.S.C. § 1988 and other applicable law;

F. That this Court adjudge, decree and declare the rights and other legal relations of the parties to the subject matter here in controversy, in order that such declarations shall have the force and effect of final judgment;

G. That this Court grant such other and further relief as the Court deems equitable, just, and proper;

H. That this Court retain jurisdiction of this matter for the purpose of enforcing the Court's Orders.

Respectfully submitted this 12th day of January, 1999

//s//
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Attorneys for Plaintiff

* Applications to the bar of this Court submitted concurrently with this Complaint.

Verification of Complaint

I, Joshua Davey, a citizen of the United States and a resident of Washington, have read the foregoing Verified Complaint for Injunctive and Declaratory Relief, and declare under penalty of perjury that the foregoing Complaint is true and correct.

Date: January 10, 2000 //s//
Joshua Davey

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DEFENDANTS' ANSWER TO VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND DAMAGES

[Caption Omitted In Printing]

Defendants Governor Gary Locke, Marcus S. Gaspard, Bob Craves, and John Klacik (hereinafter "defendants") in answer to plaintiff's Verified Complaint For Declaratory and Injunctive Relief and Damages (hereinafter "Complaint"), admit, deny, and allege as follows:

I. JURISDICTION

1. Defendants deny the allegations contained in paragraph 1. of plaintiff's Complaint.

2. Defendants deny the allegations contained in paragraph 2. of plaintiff's Complaint.

3. Defendants deny the allegations contained in paragraph 3. of plaintiff's Complaint.

4. Defendants deny the allegations contained in paragraph 4. of plaintiff's Complaint.

5. Defendants deny the allegations contained in paragraph 5. of plaintiff's Complaint.

6. Defendants deny the allegations contained in paragraph 6. of plaintiff's Complaint.

II. VENUE

7. Defendants admit the allegations contained in paragraph 7. of plaintiff's Complaint.

8. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8. of plaintiff's Complaint and, therefore, deny the same.

9. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9. of plaintiff's Complaint and, therefore, deny the same.

10. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 10. of plaintiff's Complaint and, therefore, deny the same.

11. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11. of plaintiff's Complaint and, therefore, deny the same.

IV. IDENTIFICATION OF DEFENDANTS

12. Defendants admit the allegations contained in paragraph 12. of plaintiff's Complaint.

13. Defendants admit the allegations contained in paragraph 13. of plaintiff's Complaint.

14. Defendants admit the allegations contained in paragraph 14. of plaintiff's Complaint.

15. Defendants admit the allegations contained in paragraph 15. of plaintiff's Complaint.

V. FACTUAL ALLEGATIONS

16. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 16. of plaintiff's Complaint and, therefore, deny the same.

17. Defendants admit the allegations contained in paragraph 17. of plaintiff's Complaint.

18. Defendants deny the allegations contained in paragraph 18. of plaintiff's Complaint.

19. Defendants admit the allegations contained in paragraph 19. of plaintiff's Complaint.

20. Defendants deny the allegation contained in paragraph 21. [sic] of plaintiff's Complaint that at all times during 1999, the amount was $1,125.

21. Defendants admit the allegations contained in paragraph 21. of plaintiff's Complaint.

22. Assuming by this allegation that plaintiff is alleging that "education-related expense" means tuition, fees, room and board, books and supplies, and other miscellaneous personal expenses, this allegation is admitted; otherwise defendants deny the allegations contained in paragraph 22. of plaintiff's Complaint.

23. Defendants deny the allegations contained in paragraph 23. of plaintiff's Complaint. The student receives funding and is thereafter free to select an eligible institution.

24. Defendants admit the allegations contained in paragraph 24. of plaintiff's Complaint.

25. Defendants are without knowledge or information sufficient to form a belief as to the truth of

the allegations contained in paragraph 25. of plaintiff's Complaint and, therefore, deny the same.

26. Defendants admit the allegations contained in paragraph 26. of plaintiff's Complaint.

27. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 27. of plaintiff's Complaint and, therefore, deny the same.

28. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 28. of plaintiff's Complaint and, therefore, deny the same.

29. Defendants admit the allegations contained in paragraph 29. of plaintiff's Complaint.

30. Defendants deny the allegations contained in paragraph 30. of plaintiff's Complaint. In addition, plaintiff is presumed to know the law; to wit, the provisions of RCW 28B.10.814 which reads: "No aid shall be awarded to any student who is pursuing a degree in theology."

31. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 31. of plaintiff's Complaint and, therefore, deny the same.

32. Defendants deny the allegation contained in paragraph 32. of plaintiff's Complaint that defendants stated a "new" policy. The policy referred to is found in RCW 28B.10.814, referred to above, enacted in 1969.

33. Defendants deny that such language alleged in paragraph 33. of plaintiff's Complaint appears in Exhibit A, but states that said exhibit speaks for itself.

34. Defendants deny the allegations contained in paragraph 34. of plaintiff's Complaint.

35. Defendants deny the allegations contained in paragraph 35. of plaintiff's Complaint.

36. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 36. of plaintiff's Complaint and, therefore, deny the same.

37. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 37. of plaintiff's Complaint and, therefore, deny the same.

38. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 38. of plaintiff's Complaint and, therefore, deny the same.

39. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 39. of plaintiff's Complaint and, therefore, deny the same.

40. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 40. of plaintiff's Complaint and, therefore, deny the same.

41. Defendants deny the allegations contained in paragraph 41. of plaintiff's Complaint.

42. Defendants deny the allegations contained in paragraph 42. of plaintiff's Complaint.

VI. ALLEGATIONS OF LAW

43. Defendants deny the allegations contained in paragraph 43. of plaintiff's Complaint.

44. Defendants deny the allegations contained in paragraph 44. of plaintiff's Complaint.

45. Defendants deny the allegations contained in paragraph 45. of plaintiff's Complaint.

VII. FIRST CLAIM FOR RELIEF

Violation of the Free Exercise Clause of the First Amendment to the United States Constitution

46. Answering paragraph 46. of plaintiff's Complaint, defendants reallege its answers to paragraphs 1. through 45., above, and incorporates the same by this reference as if fully set forth herein.

47. Defendants deny the allegations contained in paragraph 47. of plaintiff's Complaint.

48. Defendants deny the allegations contained in paragraph 48. of plaintiff's Complaint.

49. Defendants deny the allegations contained in paragraph 49. of plaintiff's Complaint.

50. Defendants deny the allegations contained in paragraph 50. of plaintiff's Complaint.

51. Defendants deny the allegations contained in paragraph 51. of plaintiff's Complaint.

52. Defendants deny the allegations contained in paragraph 52. of plaintiff's Complaint.

53. Paragraph 53. of plaintiff's Complaint is a prayer for relief to which no answer is due. To the extent said prayer constitutes a material allegation, it is denied.

VIII. SECOND CLAIM FOR RELIEF

Violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution

54. Answering paragraph 54. of plaintiff's Complaint, defendants reallege its answers to paragraphs 1. through 53. above and incorporates the same by this reference as if fully set forth herein.

55. Defendants admit the allegations contained in paragraph 55. of plaintiff's Complaint.

56. Defendants deny the allegations contained in paragraph 56. of plaintiff's Complaint.

57. Defendants deny the allegations contained in paragraph 57. of plaintiff's Complaint.

58. Defendants deny the allegations contained in paragraph 58. of plaintiff's Complaint.

59. Defendants deny the allegations contained in paragraph 59. of plaintiff's Complaint.

60. Defendants deny the allegations contained in paragraph 60. of plaintiff's Complaint.

61. Paragraph 61. of plaintiff's Complaint is a prayer for relief to which no answer is due. To the extent said prayer constitutes a material allegation, it is denied.

IX. THIRD CLAIM FOR RELIEF

Violation of the Establishment Clause of the First Amendment to the United States Constitution

62. Answering paragraph 62. of plaintiff's Complaint, defendants reallege its answers to

paragraphs 1. through 61. above and incorporates the same by this reference as if fully set forth herein.

63. Defendants deny the allegations contained in paragraph 63. of plaintiff's Complaint.

64. Defendants deny the allegations contained in paragraph 64. of plaintiff's Complaint.

65. Defendants deny the allegations contained in paragraph 65. of plaintiff's Complaint.

66. Paragraph 66. of plaintiff's Complaint is a prayer for relief to which no answer is due. To the extent said prayer constitutes a material allegation, it is denied.

X. FOURTH CLAIM FOR RELIEF

Violation of the Free Speech Clause of the First Amendment to the United States Constitution

67. Answering paragraph 6. [sic] of plaintiff's Complaint, defendants reallege its answers to paragraphs 1. through 66. above and incorporates the same by this reference as if fully set forth herein.

68. Defendants deny the allegations contained in paragraph 68. of plaintiff's Complaint.

69. Defendants deny the allegations contained in paragraph 69. of plaintiff's Complaint.

70. Defendants deny the allegations contained in paragraph 70. of plaintiff's Complaint.

71. Defendants deny the allegations contained in paragraph 71. of plaintiff's Complaint.

72. Defendants deny the allegations contained in paragraph 72. of plaintiff's Complaint.

73. Defendants deny the allegations contained in paragraph 73. of plaintiff's Complaint.

74. Defendants deny the allegations contained in paragraph 74. of plaintiff's Complaint.

75. Defendants deny the allegations contained in paragraph 75. of plaintiff's Complaint.

76. Defendants deny the allegations contained in paragraph 76. of plaintiff's Complaint.

77. Paragraph 77. of plaintiff's Complaint is a prayer for relief to which no answer is due. To the extent said prayer constitutes a material allegation, it is denied.

XI. FIFTH CLAIM FOR RELIEF

Violation of the Right of Freedom of Association Guaranteed by the First Amendment to the United States Constitution

78. Answering paragraph 78. of plaintiff's Complaint, defendants reallege its answers to paragraphs 1. through 77. above and incorporates the same by this reference as if fully set forth herein.

79. Defendants deny the allegations contained in paragraph 79. of plaintiff's Complaint.

80. Defendants deny the allegations contained in paragraph 80. of plaintiff's Complaint.

81. Defendants deny the allegations contained in paragraph 81. of plaintiff's Complaint.

82. Defendants deny the allegations contained in paragraph 82. of plaintiff's Complaint.

83. Paragraph 83. of plaintiff's Complaint is a prayer for relief to which no answer is due. To the

extent said prayer constitutes a material allegation, it is denied.

XII. SIXTH CLAIM FOR RELIEF

Violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution

84. Answering paragraph 84. of plaintiff's Complaint, defendants reallege its answers to paragraphs 1. through 83. above and incorporates the same by this reference as if fully set forth herein.

85. Defendants deny the allegations contained in paragraph 85. of plaintiff's Complaint.

86. Defendants deny the allegations contained in paragraph 86. of plaintiff's Complaint.

87. Defendants deny the allegations contained in paragraph 87. of plaintiff's Complaint.

88. Defendants deny the allegations contained in paragraph 88. of plaintiff's Complaint.

89. Defendants deny the allegations contained in paragraph 89. of plaintiff's Complaint.

90. Defendants deny the allegations contained in paragraph 90. of plaintiff's Complaint.

91. Defendants deny the allegations contained in paragraph 91. of plaintiff's Complaint.

92. Paragraph 92. of plaintiff's Complaint is a prayer for relief to which no answer is due. To the extent said prayer constitutes a material allegation, it is denied.

XIII. SEVENTH CLAIM FOR RELIEF

Violation of the Right of Free Exercise of Religion Guaranteed by the Washington State Constitution, article I, section 11

93. Answering paragraph 93. of plaintiff's Complaint, defendants reallege its answers to paragraphs 1. through 92. above and incorporates the same by this reference as if fully set forth herein.

94. Defendants deny the allegations contained in paragraph 94. of plaintiff's Complaint.

95. Defendants deny the allegations contained in paragraph 95. of plaintiff's Complaint.

96. Defendants deny the allegations contained in paragraph 96. of plaintiff's Complaint.

97. Defendants deny the allegations contained in paragraph 97. of plaintiff's Complaint.

98. Defendants deny the allegations contained in paragraph 98. of plaintiff's Complaint.

99. Defendants deny the allegations contained in paragraph 99. of plaintiff's Complaint. It is further specifically denied that the allegations under this Claim for Relief in any way raise proper federal issues or confer in any way jurisdiction over the State of Washington or any other named State officer in their official capacity in this or any other federal court.

100. Paragraph 100. of plaintiff's Complaint is a prayer for relief to which no answer is due. To the extent said prayer constitutes a material allegation, it is denied.

XIV. EIGHTH CLAIM FOR RELIEF

Violation of the Right of Free Speech Guaranteed by the Washington State Constitution, article I, section 5

101. Answering paragraph 101. of plaintiff's Complaint, defendants reallege its answers to paragraphs 1. through 100. above and incorporates the same by this reference as if fully set forth herein.

102. Defendants deny the allegations contained in paragraph 102. of plaintiff's Complaint.

103. Defendants deny the allegations contained in paragraph 103. of plaintiff's Complaint.

104. Defendants deny the allegations contained in paragraph 104. of plaintiff's Complaint.

105. Defendants deny the allegations contained in paragraph 105. of plaintiff's Complaint.

106. Defendants deny the allegations contained in paragraph 106. of plaintiff's Complaint.

107. Defendants deny the allegations contained in paragraph 107. of plaintiff's Complaint.

108. Defendants deny the allegations contained in paragraph 108. of plaintiff's Complaint.

109. Defendants deny the allegations contained in paragraph 109. of plaintiff's Complaint. It is further specifically denied that the allegations under this Claim for Relief in any way raise proper federal issues or confer in any way jurisdiction over the State of Washington or any other named State officer in their official capacity in this or any other federal court.

110. Paragraph 110. of plaintiff's Complaint is a prayer for relief to which no answer is due. To the extent said prayer constitutes a material allegation, it is denied.

By way of Further Answer and Affirmative Defenses, defendants allege:

1. That the plaintiff has failed to state a claim upon which relief may be granted.

2. That the defendants, and each of them, are immune from liability for damages under the doctrine of qualified immunity because their conduct did not violate clearly established law.

3. That defendants Locke, as Governor of the State of Washington, and Craves, as Chair of the Higher Education Coordinating Board, did not personally participate in any alleged deprivation of plaintiff's constitutional rights and are not liable in respondeat superior for the acts or omissions of others.

4. That the defendants at all times acted in good faith in the performance of their duties and are, therefore, immune from suit for the matters charged in plaintiff's Complaint.

5. That the State of Washington is the only real defendant in interest and the Eleventh Amendment of the United States Constitution bars this action.

6. That the injuries and damages, if any, claimed by plaintiff were proximately caused or contributed to by the fault of plaintiff.

7. That the plaintiff, on information and belief, was not required to declare a major for his first two years of college, which coincides with his eligibility to receive the subject Promise Scholarship, and that in declaring a major in theology, his sole purpose was to create a case or controversy, for purposes of litigation only.

8. That if the plaintiff suffered any damages, recovery therefore is barred by plaintiff's failure to mitigate said damages

9. That, upon information and belief, Northwest Colleges may be pervasively sectarian.

10. That the plaintiff's Complaint raises substantial questions of state law, which involve sensitive matters of substantial public import to the State of Washington and which may be determinative of any such issues of federal law as the plaintiff may have raised. This Court should, therefore, abstain.

WHEREFORE, having fully answer and defended affirmatively, defendants pray:

1. That plaintiff's Complaint be dismissed with prejudice and that the plaintiff takes nothing by his Complaint.

2. Alternatively, that this Court abstain from determining any and all issues raised by the Complaint until the State courts have had an adequate opportunity to determine the substantial issues of State law involved.

3. For an award of costs and attorney's fees as authorized.

4. For such other and further relief as the Court deems appropriate.

DATED this 1st day of February, 2000.

CHRISTINE O. GREGOIRE
Attorney General

//s//
W. HOWARD FISCHER,
WSBA #6142
Senior Assistant Attorney General
(360) 586-2789
Attorneys for Defendants

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DECLARATION OF JOSHUA DAVEY IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

[Caption Omitted In Printing]

I, Joshua Davey, do hereby swear and depose as follows:

1. I am the plaintiff in this lawsuit and submit this declaration in support of my motion for a preliminary injunction.

2. Where I have referenced a document in this declaration, I have attached to this Declaration a true and correct copy of the cited document.

3. I am a resident of Spokane, Washington and am currently living in Kirkland, Washington while I attend college.

4. I am a Christian, and am committed to living out my faith in every aspect of my life. I believe that the Bible teaches that all Christians are to serve God throughout their lives. For me, this means expressing my faith through full-time service in the ministry. Because of this religious belief, I have planned for many years to attend a Bible college and to prepare myself through that college training for a lifetime of ministry, specifically as a church pastor. My religious beliefs are the only reason for me to seek a college degree.

5. In May, 1999, I was a senior at University High School in Spokane, Washington. During that month, I learned of the "Washington Promise Scholarship" ("Scholarship [sic]) that would award certain students about $1500 each year for the first two years of college. The funds could be applied to any education related expenses.

6. A student would be entitled to the Scholarship if (a) his or her academic rank was in the top ten percent of the graduating class; (b) he or she had a family income that was below 135% of the [sic] Washington's median income; and (c) he or she enrolled in a public or private school within Washington that offered an accredited, four-year post-secondary education, or in certain Washington public or private two-year institutions. This information is summarized in the 1999 Scholarship Overview, dated May, 1999. (Attached as Exhibit A).

7. When I graduated from University High School, my academic rank was within the top ten percent of my class, and my family income was less than 135% of the median income for a four-person family in Washington.

8. I chose to attend Northwest College ("Northwest") in Kirkland, Washington. Northwest is a private, four year college.

9. My reasons for choosing Northwest were several: (a) It offered a course of study that would allow me to fulfill my religious convictions regarding becoming a minister. (b) It offered the course of study at a very reasonable cost. I had compared costs with other colleges offering similar majors, and found that in most cases, Northwest was several

thousand dollars less expensive for a comparable course of study, for each academic year. (c) Northwest was within Washington and relatively close to my hometown. (d) Its denominational affiliation was similar to the Foursquare Denomination, of which I am a member. Northwest is affiliated with the Assemblies of God Denomination, which holds tenets of faith very similar to those held by the Foursquare Denomination.

10. According to Northwest's *Academic Catalog*, the college is accredited by the Northwest Association of Schools and Colleges; is approved by the State of Washington Board of Education to prepare elementary and secondary teachers for state certification; and is listed in the current bulletin, "*Accredited Higher Education Institutions*," published by the U.S. Office of Education. Please refer to Exhibit B, at Declaration pp. 13-14, for accreditation information. Because I met the academic and financial criteria, and because I had planned to attend Northwest, which was an accredited four-year college within Washington, I applied for the Scholarship before the September 1, 1999 deadline for applications.

11. Shortly thereafter, I received a letter from Marcus S. Gaspard, dated August 21, 1999. (Attached as Exhibit C). Mr. Gaspard is the Executive Director of the Washington Higher Education Coordinating Board ("HECB"). In that letter, Mr. Gaspard told me that I was eligible to receive the Scholarship.

12. Mr. Gaspard also stated in his August 21, 1999 letter that the maximum award was $1,584 for

the 1999-2000 academic year, but that the value of the award would ultimately be based on the total funding available and the number of qualifying students.

13. In August, 1999, I enrolled at Northwest and chose a course of study that I believed would best prepare me to be a Christian minister.

14. Specifically, I decided upon a double major: Pastoral Ministries and Business Management/Administration. I believed that this combination of courses would best prepare me for the complex management and spiritual tasks that comprise contemporary Christian ministry. Under this double major, I have studied or will study courses in a multitude of disciplines: humanities, science, mathematics, social science, business, finance, computer applications, religion, Biblical studies, and pastoral ministry.

15. The courses I have attended to date at Northwest do not appear to proselytize non-believers. Rather, each course, regardless of the discipline involved, is taught from the viewpoint of what Christians believe to be absolute truth, as conveyed in the Bible. This is one of the things that attracted me to Northwest: the opportunity to study our world and our society from the viewpoint of a Biblical worldview.

16. In October, 1999, I received a letter from Governor Gary Locke which was dated September 28, 1999. (Attached as Exhibit D). Governor Locke congratulated me for being selected to receive the Scholarship. He noted that the high cost of tuition prevents many students from attending college, and

said that is why he proposed the Scholarship program to the Legislature.

17. Governor Locke also said that education is the "great equalizer" for our society, and that a "quality education places us all on a more level playing field," regardless of our gender, race, ethnicity, or income. The Governor enclosed a handsome certificate with his letter, which recognized my "outstanding academic achievement" and honored "the valuable contributions" that I will make to the state of Washington. (Attached as Exhibit E). The certificate was presented to me to support my "pursuit of a college education in Washington State." The certificate was signed by Governor Locke.

18. Also in October, 1999, I received from the HECB a "Washington Promise Scholarship Disbursement Information Sheet," dated September 24, 1999. (Attached as Exhibit F). The Information Sheet advised me that the Scholarship would be worth $1,125 for the 1999-2000 academic year, and that the first semester's payment would be $563.

19. The Information Sheet specified that my award would be in the form of a warrant that would be sent to my college. Once my college confirmed my enrollment, it had to pass the warrant on to me. If my enrollment was not confirmed, the warrant had to be returned to the HECB.

20. According to the Information Sheet, it was my choice on how the award would be used, so long as it was spent for "tuition or other educational expense." Northwest was not allowed to automatically deduct anything from the warrant.

21. Just a few days later, on or about October 28, 1999 I met with Lana Walter, Director of Financial Aid at Northwest. Ms. Walter told me that the HECB had recently notified her that students majoring in "theology-related fields" were not eligible for the Scholarship. She told me that all students who were eligible to receive the award must first certify in writing that they were not majoring in theology-related fields. I have attached a copy of the certification form as Exhibit G.

22. Until my meeting with Ms. Walter, I had absolutely no knowledge of any requirement or policy that would prohibit a person who was "pursuing a theology degree" from receiving the Scholarship. No state or school official raised the issue; nor was there any statement on the Scholarship application materials or any other document I had seen as of October 28, 1999.

23. On October 29, 1999, my father, Dan Davey, contacted the American Center for Law and Justice and asked if that organization would be able to assist me.

24. I did not speak with any attorney regarding this matter prior to November 18, 1999.

25. Within a few days of my meeting with Ms. Walter, I obtained from her a copy of a memorandum from John Klacik to "Financial Aid Administrators," dated October 12, 1999, that stated "students who are pursuing a degree in theology are not eligible to receive *any* state-funded student financial aid, including the new Washington Promise Scholarship." (Attached as Exhibit H).

26. When Ms. Walter told me about the HECB's refusal to fund "theology" majors and gave to me Mr. Klacik's October 12, 1999 memorandum, I felt that I was a second-class citizen in the eyes of the state. Somehow, apparently because my religious beliefs require me to pursue a degree in Pastoral Ministries and to eventually become a minister, my academic achievements were no longer worthy of official recognition, nor were my future contributions to the state of Washington worthy of honor.

27. This unexpected, official demand to change my major or lose my funding confronted me with a serious dilemma: Should I change my religious beliefs that required me to study for the ministry? Worse, should I violate my religious belief regarding truthfulness by changing my course of study to a state-approved major, with the intent of switching back to the forbidden major once I had exhausted my Scholarship eligibility? Either way, if I signed that form I would have denied what I believed to be God's direction for my life, and would have had to violate my sincerely held religious beliefs. After much pondering and prayer, I refused to sign.

28. I refused to sign the form because I saw that the state openly discriminated against one class of persons: Religious students who take their faith so seriously that they want to serve their fellow believers and their society through their faith. The people who suffered this official discrimination were like myself: people who express their faith not just within the cloisters of a church, but in all aspects of their lives, including their choice of college and career. When I refused to sign, I meant it as a

statement of protest against the state officials' discriminatory act.

29. I also refused to sign the form because I did not understand what I could or could not study without violating the HECB's requirement that I must not pursue a degree in theology. At Northwest, I could take many theology, Bible, and Christian ministry courses as electives, regardless of the major I declared, and several such courses are required of all students, as shown in Exhibit B, pp. 15-16. Therefore, I was not at all certain that changing my major to another discipline would solve the problem, because there was no definition of what comprised a "theology" degree or what it meant to "pursue" such a degree.

30. I also refused to sign the certificate because I was given a choice to either fully exercise my faith or receive a government benefit for which I qualified under criteria completely unrelated to religion. It seemed to me like the state was simply imposing a back-door tax on religious believers, and I knew that was wrong.

31. I also refused to sign the certificate because I realized that many others [sic] Christians or other religious believers might have to make the same choice, but lacked the courage to resist such coercive discrimination against people of faith. My refusal was a statement of protest on their behalf, as well as mine.

32. Because I refused to certify in writing that I would not pursue a theology degree, I have received no funds whatsoever from the Scholarship, even

though I understood that a check for the award had been received by Northwest.

33. My educational expenses for the 1999-2000 academic year exceed the amount I will receive from other financial aid programs. I had relied upon the Scholarship to pay educational expenses that I would incur during my first two years at college.

34. The impact of losing the Scholarship will be even greater next year, because some of my financial aid for my freshman year will not carry over to the sophomore year.

35. Accordingly, I am having to work more hours than I planned during the first two years, to compensate for the loss of my Scholarship.

36. I am currently employed as a floor assistant at Yarrow Bay Grill. I earn a minimum wage of $6.50 an hour, plus tips which increase my overall hourly compensation to about $14 an hour, before taxes.

37. Thus, to make up the $1,125 Scholarship award that I would have received for the 1999-2000 academic year, I will have to work about an additional 80 hours at $14 ar hour.

38. Northwest recommends that students who work over 25 hours a week should take no more than 13 hours of class credit. Ex. B, p. 23. In the 1999-2000 academic year, I have worked and will continue to work about 25 hours a week. I carried 17 credit hours in the fall, 1999 semester and am carrying 18 hours in the spring, 2000 semester.

39. During the time I am working, I cannot study, attend class, or associate with my fellow believers for worship.

40. The extra time I must work to compensat for the loss of the Scholarship has adversely affected my college studies.

41. The extra time I must work to compensate for the loss of the Scholarship has adversely affected my college studies. [sic]

42. In January, 2000, I received via the United States mail a letter dated January 20, 2000, from Marcus S. Gaspard. (Attached as Exhibit I. [sic]). It gave directions for renewing the Scholarship for the 2000-2001 academic year, and stated that the maximum value of the award for the 2000-2001 academic year was $1641. The exact value will depend upon the number of eligible applicants as of July, 2000. The letter further stated that I "must use" my award by June 30, 2001, and that "according to Washington State Law, no state financial aid shall be awarded to any student pursuing a degree in theology (RCW 28B.10.814)."

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 7, 2000, in Kirkland, Washington.

//s//
JOSHUA DAVEY

Exhibit A

1999 Washington Promise Scholarship

An overview from the Higher Education Coordinating Board - May 1999

The 1999 Legislature and Governor Gary Locke created a new college scholarship program for low- and middle-income students who achieve an excellent academic record throughout their high school careers. For 1999, the scholarship is available to graduating high school students in the top 10% of their senior class who meet certain family income limits. The scholarship will be available this fall and may be renewed for one additional year. There is no guarantee that the scholarships will be available after June 30, 2001. Students should apply for and use these funds prior to June 30, 2001.

Who Is Eligible?

To be eligible you must meet these criteria:

1. Be designated by your high school as in the top 10% of the 1999 graduating senior class.
2. Have a family income that is equal to or less than 135% of the state's median. See the income chart below.

3. Attend an accredited public or private university, college or other accredited post-secondary institution in the state of Washington.

What Are the Income Cutoffs?

To qualify for the monetary award, your family income must be equal to or less than the income cutoffs on this chart. The number of family members means the number of people for whom your parent(s) or guardian(s) provide more than one-half of the support.

Family Size	Adjusted Gross Income	Family Size	Adjusted Gross Income
1	$36,100	5	$80,600
2	$47,200	6	$91,700
3	$58,400	7	$93,800
4	$69,500	Add $2,100 for each additional family member.	

How Much is the Award Worth? Can It Be Renewed?

The value of the award depends on how many eligible students qualify for the scholarship. The maximum award is $1,585 per year. The exact value of this year's award will be determined around mid-September 1999. The scholarship may be renewed for one additional year, but does not extend beyond June 30, 2001.

How Do I Apply? When Will I know if I Qualify?

To apply simply complete the application on the back of this fact sheet and return it to the Higher Education Coordinating Board. We encourage you to return the application as soon as possible, but it

must be received by the **deadline** of *September 1, 1999*. Students who qualify will be notified this fall. The first disbursements will be available during the fall term.

How will my family's income be verified?

The family income must be verified. Please enclose a photocopy of page 1 and page 2 of your parent(s) 1998 federal tax return form (1040/1040A/1040EZ) with the application. If no tax return has been filed, please call the Higher Education Coordinating Board to request an "income verification" form.

For more information:

Higher Education Coordinating Board, 360-753-7801
Governor's Executive Policy Office, 360-902-0577

Exhibit C

[Higher Education Coordinating Board Letterhead]

August 21, 1999

Joshua Davey
10424 E 5th Ave
Spokane, WA 99206-3535

Dear Joshua:

RE: Washington Promise Scholarship Application

Congratulations! On behalf of Governor Gary Locke and the Washington Legislature, I am pleased to inform you that you are eligible to receive the Washington Promise Scholarship.

You may use the scholarship to attend any accredited postsecondary institution in Washington for the 1999-2000 and the 2000-2001 academic years. The scholarship may be used to attend public and private colleges, universities and career training schools. The minimum enrollment to receive the scholarship is six credits or at least a half-time status at the school you attend.

The maximum value of the award will be $1,584 for the 1999-2000 academic year. But because the application period for the scholarship has not yet closed, we will not determine the exact value of the scholarship until late September. We will calculate the value of the award based on the total funds

available and the number of qualifying students. Depending on the number of eligible applicants the award could be less than the maximum.

Once its exact value is established, your scholarship will be disbursed in equal amounts at the beginning of each academic term from fall through spring. The fall disbursement will occur in October. Be prepared to cover all educational costs until the scholarships are disbursed.

If you have questions about the scholarship, disbursements, or eligible schools, please contact us at 1-888-535-0747 or by email at wapromise@hecb.wa.gov. Again, congratulations on your scholarship.

Sincerely,

//s//
Marcus S. Gaspard
Executive Director

MG:ss

Exhibit D

[Office Of The Governor Letterhead]

September 28, 1999

Joshua Davey
10424 E. 5th Avenue
Spokane, WA 99206

Dear Joshua:

Congratulations on your selection as a Washington's Promise Scholarship recipient! I am proud of your outstanding academic achievements and enthusiastic about your promising future.

As we prepare to meet the challenges of the 21st century, individuals increasingly need a college education to earn a living wage. Unfortunately, the high cost of tuition and living expenses prevents many students from attending college. It is why I proposed, and the Legislature funded, Washington's Promise Scholarships. While far from covering all the costs associated with college, these scholarships will help ease the financial burden for many families in our state.

The amount of the Washington's Promise Scholarship for the 1999-2000 school year is $1,125. Your college's financial aid office has received this amount in your name. While our initial goal for the program was to award an amount equal to the cost of community college tuition in our state, more

students qualified for these awards than originally anticipated. As a result, I plan to introduce legislation in January that would increase the size of each scholarship. Next summer, you will be notified of your scholarship amount for the 2000-2001 school year.

Education is the great equalizer in our society. Regardless of gender, race, ethnicity, or income, a quality education places all of us on a more level playing field. I know this from personal experience. I was born into an immigrant family and spent the first six years of my life in public housing. Like you, I worked hard in high school and graduated with honors. I attended college and then law school. My education contributed greatly to my success, and I am personally committed to providing the best possible educational opportunities for the young people of the state of Washington.

Again, congratulations on your outstanding academic achievement. I wish you all the best in your studies and hope you will continue to enjoy learning throughout your life.

Sincerely,

//s//
Gary Locke
Governor

Exhibit F

[Higher Education Coordinating Board Letterhead]

How the Promise Scholarship Will Be Disbursed

The Washington Promise Scholarship is worth $1,125 for the 1999-2000 academic year. One payment will be made per term until completed. The fall term award at a school that enrolls on the quarter system will be $375. The fall term award at a semester school will be $563.

Payments will be made for the fall quarter/semester, the winter quarter, and the spring quarter/semester. There are no disbursements for summer sessions.

In order to receive a payment you must be enrolled for at least six credits (a half-time rate) at an eligible, accredited, institution within the State of Washington. Each participating school and college will have the list of students who are eligible to receive the award. Once the college has confirmed your enrollment, it will request payment of the scholarship from the Higher Education Coordinating Board in Olympia. Payments are made through the student accounts or business office of the college you attend. Schools may request payment of the fall scholarship beginning on October 1, 1999.

If you are attending a public university, community college, or public technical college the school will use the award to pay any remaining tuition or other educational expense you owe to the school. If nothing is owed to the school or if a balance remains

after tuition and such is paid, the school will disburse the remainder directly to you.

If you attend a private four-year college or a private technical school, a warrant from the Higher Education Coordinating Board will be given directly to you by the school after a final check on enrollment. If you choose, you may use the warrant to pay for tuition or other educational expenses, but the school may not automatically deduct anything from the warrant. The warrant must be given to you or returned to the Board.

If you enroll in two schools during the same term you will be able to use the scholarship at only one institution. If you transfer to a different eligible college within Washington for the winter or spring terms the scholarship can be transferred to that school.

If you have questions about the Promise Scholarship or problems with disbursement, please call the Board, in Olympia, at either 1-888-535-0747 (this is a toll free call) or at (360) 753-7801.

Thank you.

Exhibit G

Certification Statement for Electronically Conveyed Payment Requests

Washington Promise Scholarship Program

Send the certification to:

Higher Education Coordinating Board
Washington Promise Scholarship Program
P.O. Box 43430
Olympia, Washington 98504-3430

The Higher Education Coordinating Board must receive this certification before it can release funds based on an electronically transmitted payment request.

DATE: _____

FROM: _____
Name of Financial Aid Administrator or Designee (please print)

SCHOOL: _____ Code _____

- Date the Payment Request Was Submitted _____
- Method of Submission _____ (choose one: email attachment, or Diskette, or FTP)
- Number of Students For Which Payment Was Requested _____

Certification:

These students are eligible for Washington Promise

Scholarship funds according to the following criteria:

A. Each student has been matched and verified as eligible against the list of eligible students provided by the Higher Education Coordinating Board.
B. Each student is enrolled at least at a half-time rate.
C. No student is pursuing a degree in theology.

I hereby certify that the above statement is a true and accurate report of the status of Washington Program Scholarship recipients for the term indicated on the diskette or in the attached email.

_____ _____

Financial Aid Administrator or Designee Signature — Date

Exhibit H

October 12, 1999

TO: Financial Aid Administrators

FROM: John Klacik

SUBJECT: WASHINGTON PROMISE SCHOLARSHIP: DEGREES IN THEOLOGY

Over the past few days, you have received differing messages from me regarding institutional certification of student eligibility for the Washington Promise Scholarship. The first certification included a statement, borrowed from the Educational Opportunity Grant program statute, that Washington Promise Scholarships recipients would not be engaged in various aspects of religious instruction. On Friday, based on staff review of the legislation establishing the Promise Scholarship program and on feedback from some institutions that time did not allow for such a comprehensive certification, we modified the statement, removing that reference.

Based on further review and consultation with the Attorney General's Office, however, I am writing to clarify that students who are pursuing a degree in theology are not eligible to receive *any* state-funded student financial aid, including the new Washington Promise Scholarship. Although the Appropriations Bill creating this program is silent on this issue, the State Constitution is clear regarding the separation

of church and state. We have consistently interpreted this constitutional provision as prohibiting state financial aid funds for students who are pursuing a degree in theology. That prohibition must also be applied to this new program.

A statement certifying that Washington Promise Scholarship recipients are not pursuing a degree in theology will be added to the Payment Request Form.

We apologize for the confusion, and hope that this clarification will be helpful. Please contact me if you have any questions. I can be reached by telephone at [redacted], or by email at [redacted].

Thank you.

Exhibit I

[Higher Education Coordinating Board Letterhead]

January 20, 2000

Dear 1999 Promise Scholarship Recipient:

Enclosed is the renewal application for the Washington Promise Scholarship 2000-2001 academic year. As a 1999 recipient, you are not required to re-qualify for the scholarship or to submit income information, however, you must submit a completed renewal application to receive your scholarship for the second year.

Please return your renewal application to the Higher Education Coordinating Board (HECB) as soon as possible, but no later than **May 1, 2000**.

Your scholarship may be used at any accredited postsecondary institution in the state of Washington, including public and private colleges, universities, and career training schools. The maximum value of the 2000-2001 award is $1641, however the exact value depends on the number of eligible applicants and will be determined in July 2000. As a 1999 graduate, you must use your award by June 30, 2001.

The scholarships are disbursed at the beginning of each academic term, and sent directly to the accredited Washington college you attend. You must attend at least half time each term. The college will request scholarship funds from the HECB after verifying your enrollment. You will receive

payments for fall, winter, and spring quarters, or fall and spring semesters. Also, according to Washington State law, no state financial aid shall be awarded to any student pursuing a degree in theology (RCW 28B.10.814).

Additional program information is available on our website at www.hecb.wa.gov. If you have questions regarding your renewal application, please call us toll free at (888) 535-0747, or contact us by email us [sic] at wapromise@hecb.wa.gov.

Sincerely,

Marcus S. Gaspard
Executive Director

MSG:DL:cs
Enclosure

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DECLARATION OF GARY S. MCCALEB IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

[Caption Omitted In Printing]

I, Gary S. McCaleb, do hereby declare and state:

1. I am counsel to the plaintiff in the above captioned action.

2. I have personal knowledge of the matters testified to herein, am over the age of eighteen, and am competent to testify.

3. Attached hereto as Exhibit A is a true and correct copy of the frontispiece and page numbers 173-74, 178, and 199-204 of the *University of Washington General Catalog 1998-2000.* Plaintiff requests that the court take judicial notice of the materials attached in Exhibit A pursuant to Fed. R. Evid. 201.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 8th, 2000, in Scottsdale, Arizona.

//s//
Gary S. McCaleb

Exhibit A

UNIVERSITY OF WASHINGTON

GENERAL CATALOG 1998-2000

UNDERGRADUATE STUDY

GRADUATE STUDY

UNIVERSITY ADMINISTRATION

University Administration

Richard L. McCormick, President
Lee L. Huntsman, Provost and Vice President for Academic Affairs
Weldon E. Ihrig, Executive Vice President
Myron Apilado, Vice President for Minority Affairs
Marilyn B. Dunn, Vice President for Development
Robert G. Edie, Vice President for University Relations
Paul G. Ramsey, Vice President for Medical Affairs
Ronald A. Johnson, Vice President for Computing & Communications
Ernest R. Morris, Vice President for Student Affairs
Wilbur W. Washburn, Executive Director, Admissions and Records

Board of Regents

Mari J. Clack — Daniel J. Evans
William H. Gates — Scott D. Oki
Constance L. Proctor — H. Jon Runstad
Samuel Stroum — Michele (Shelly) Yapp
Cindy Zehnder

Jennefer L. Penfold, Secretary

V'Ella Warren, Treasurer

This publication is available in alternate formats upon request. Contact the Office of Admissions (206) 543-9686.

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* * *

COMPARATIVE RELIGION

RELIG 201 Introduction to World Religions: Western Traditions (5) I&S *Jaffee, Webb, Williams* History of religions, concentrating on religious traditions that have developed west of the Indus. Primary attention to the Semitic religions (Judaism, Christianity, Islam) and to their ancient world background with emphasis on basic conceptual and symbolic structures.

RELIG 202 Introduction to World Religions: Eastern Traditions (5) I&S *Conlon, Cox* History of religions, concentrating on religions that have developed in South Asia and East Asia. Primary attention to Hinduism and Buddhism; other important Asian religions are discussed in relation to them, with emphasis on basic conceptual and symbolic structures.

RELIG 210 Introduction to Judaism (5) I&S *Jaffee* Basic ideas and motifs of Judaism: God, Covenant, Law, Life Cycle (birth, marriage, family life, sexual laws, role of women, death); Cycle of the Year (Sabbath, holidays, festivals); Holy Land, prayer, Messianism.

RELIG 211 Islam (5) VLPA/I&S *Wheeler* Religious and cultural milieu of Arabia before Muhammad; Muhammad's call and struggles to establish the new faith; Quranic content and style; Western and Muslim scholarship and the Quran; place of traditions in the Islamic edifice; Muslim political and religious thought; sources of Muslim religious law;

and modern Muslim movements. In English. Offered: jointly with NEAR E 211.

RELIG 212 Introduction to the Quran (3) VLPA/I&S *Wheeler* Emphasis on the historical context of the Quran, the history of the text, its collection, organization, and interpretation. In English. Offered: jointly with NEAR E 212.

RELIG 220 Introduction to the New Testament (5) VLPA/I&S *Williams* Modern scholarly methods of research and analysis in dealing with New Testament books and their interpretation. Genres of various books (gospel, epistle, sacred history, apocalypse); problems of the relationships among author, material, and intended audience; relationships between theme and image.

RELIG 240 Introduction to the Hebrew Bible: Old Testament (5) VLPA/I&S *Jaffee* Introduction to the Hebrew Bible in English. Results of modern critical studies on the Bible and the ancient Near East. Concentrates on the meaning of Biblical records in their own time and environment. Offered: jointly with NEAR E 240.

RELIG 301 Religious Thought Since the Middle Ages (5) I&S *Webb* Development of religious thought in the West from the Middle Ages to the twentieth century. History of focal ideas: God, man, knowledge, and authority during this period and the relation of changes in these ideas to the ways in which basic issues in religious thought have been conceived. Recommended: RELIG 201.

RELIG 320 Comparative Study of Death (5) I&S Death analyzed from a cross-cultural perspective. Topics include funerary practices, concepts of the

soul and afterlife, cultural variations in grief, cemeter-

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ies as folk art, and medical and ethical issues in comparative context. American death practices compared to those of other cultures. Offered: jointly with ANTH 322.

RELIG 322 The Gospels and Jesus of Nazareth (5) I&S *Williams* Gospel material from early Christianity, including both canonical and noncanonical gospels. Relation of gospels to analogous literature from the Hellenistic-Roman period. Recommended: ENGL 310 or RELIG 220.

RELIG 324 The Emergence of Christianity (5) I&S *Williams* Studies stages in the development of Christianity as a new religion, during the first to fifth centuries CE, as the classical forms and institutions of Christian "orthodoxy" gradually achieved definition, and as this emerging Christian tradition became a dominant cultural and socio-political force. Recommend: HIST 307, RELIG 201, or RELIG 220.

RELIG 327 Eastern Christian Traditions (5) I&S *Webb* Eastern Christian traditions, with principal focus on Eastern Orthodox tradition in Byzantium and Russia from time of the Council of Nicea to the twentieth century. Considers significant differences between eastern and western Christianity and their doctrinal and cultural origins; explores distinctive features of eastern tradition. Recommended: HIST 307 or RELIG 201.

RELIG 350 Buddhism and Society: The Theravada Buddhist Tradition In South and

Southeast Asia (5) I&S *Keyes* Religious tradition of Theravada Buddhism (as practiced in Sri Lanka, Burma, Thailand, Laos, and Cambodia). Variations in ethical orientations developed through Theravada Buddhist ideas. Recommended: RELIG 202 or one eastern religions course. Offered: jointly with ANTH 352.

RELIG 352 Hinduism (5) I&S *Pauwels* Varieties of Hindu religious practice; the diverse patterns of religious through and action among contemporary Hindus. Includes ritual behavior, village Hinduism, tantrism, sadhus, yoga, sects; the major gods and their mythologies, religious art, and the adjustments of Hinduism to modernity. Recommended: RELIG 202 or one South Asian culture course.

RELIG 354 Buddhism (5) I&S *Cox* Buddhism as a religious way and as a way of thinking; the forms of Buddhism known in South Asia (India, Sri Lanka) and those introduced from there to Tibet and other parts of Central Asia. Includes the "Three Jewels" (i.e., the Buddha or Awakened Person, the Teaching [Dharma], and Community [Sangha]) around which Buddhism is traditionally articulated. Recommended: RELIG 202 or one Asian cultures course.

RELIG 380 The Nature of Religion and Its Study (5) I&S *Jaffee, Webb* Study of religion as a general human phenomenon. Manner in which different methods of inquiry (phenomenology, anthropology, sociology, psychology, literary criticism, archaeology, philosophy, theology) illuminate different aspects of religion and help to shape our conceptions of its nature. Recommended: RELIG 201 or RELIG 202. Offered: jointly with CHID 380.

RELIG 399 Study Abroad–Comparative Religion (1-5, max. 15) I&S For participants in study abroad program. Specific course content varies. Courses do not automatically apply to major/minor requirements.

RELIG 400 The Jewish Mystical Tradition (5) I&S *Jaffee* Jewish esoteric thought from antiquity to early modern times. Emergence of Spanish Kabbalah. The thought of Isaac Luria and its immense influence in Jewish history through other movements-specifically the mystical messiah. Sabbetai Sevi, and the rise of Hasidism. Recommended: 201 or 210.

RELIG 405 Scripture In Judaism (5) I&S *Jaffee* Explores the phenomenon of religious interpretation of sacred books by attending to the destiny of the Bible as read within Judaism. Begins with the canonization of the biblical text itself and continues into the rationalist and mystical interpretive innovations of the Middle Ages. Recommended: HIST/SISJE 250, RELIG 201, or RELIG 210.

RELIG 410 Law In Judaic Experience (5) I&S *Jaffee* Place and function of law in Jewish social and personal experience. Discusses the various ideological justifications of the law in biblical and rabbinic literature, examines representative texts, and explores theological reflection on law by medieval and modern thinkers. Recommended: RELIG 201; RELIG 210; RELIG 400 or RELIG 405.

RELIG 415 Modern Jewish Thought (5) I&S *Jaffee* Major trends in Jewish religious thought since the European Enlightenment, focusing on encounters between Judaism and the modern world. Includes Haskalah; varieties of religious reform and

accommodation; Zionism; socialism; the philosophy of Rosenzweig, Buber, and Kaplan; and theological responses to the Holocaust. Recommended: HIST/SISJE 250, HSTEU/SISJE 469, RELIG 201, or RELIG 210.

RELIG 420 The World of the Early Church (5) I&S *Williams* Early Christian church within the context of the Greco-Roman sociopolitical, philosophical, and religious environment. Covers the period from about AD 100 to 300. Christian thinkers and documents studied include both the classical "orthodox" and the "heretical." Recommended: HIST 307, RELIG 220, or RELIG 324.

RELIG 421 The Age of St. Augustine (5) I&S *Williams* Christian church in the fourth and fifth centuries as a major institution in the Roman Empire. Great figures of patristic theology, such as Athanasius, Gregory Nazianzus, Gregory of Nyssa, and Augustine. Recommended: HIST 307, RELIG 320, or RELIG 324.

RELIG 426 Gnosticism and Early Christianity (5) I&S *Williams* Impact of Gnosticism on the development of Christianity and several other religious groups of that period. Readings dating from the first through the third centuries AD.

RELIG 428 Modern Christian Theology (5) I&S *Webb* Modern Protestant and Catholic thought since the nineteenth century: Kierkegaard, Barth, Bultmann, Rahner, Lonergan, and other major figures. Recommended: RELIG 301.

RELIG 430 Scripture In Islam (3) VLPA/I&S *B Wheeler* Examines concept and use of scripture in Islam, with special attention to issues of cannon and

commentary, heavenly books, talismanic uses, and the place of scripture in ritual. In English translation. Offered: jointly with NEAR E 430.

RELIG 432 Ritual and Law In Islam (5) VLPA/I&S Comparative study of Islamic ritual practices and related development of jurisprudence and law. Focus on sacrifice, political and social legal theory, pilgrimage, regulation of the body, and the diversity of contemporary practices. In English. Offered: jointly with NEAR E 432; W.

RELIG 442 Art, Religion, and Politics In the Early Christian Period, 300-700 AD (3) VLPA/I&S *Kartsonis* Evolution of the art of the early Christian period (300-700 AD) in the context of contemporary religious, political, and cultural developments. Recommended: some background in Byzantine art or history. Offered: jointly with ART H 462.

RELIG 443 Art, Religion, and Politics In Byzantium, 700-1453 AD (3) VLPA/I&S *Kartsonis* Evolution of the art of Byzantium (700-1453 AD) in the context of contemporary religious, political, and cultural developments. Recommend: some background in Byzantine art or history. Offered: jointly with ART H 453.

RELIG 445 Greek and Roman Religion (3) VLPA/I&S *Harmon, Langdon* Religion in social life of Greeks and Romans; emphasis on their public rituals and festivals. Priesthoods, personal piety, rituals of purification and healing, and the conflict of religions in the early Roman Empire. Recommended: RELIG 201. Offered: jointly with CLAS 445.

RELIG 449 Religious Movements: The Sociology of Cults and Sects (5) I&S *Stark* Understanding religion, what it is and what it does. Examines the formation of new religious movements, cults, and sects and the conditions under which they succeed or fail. Offered: jointly with SOC 445.

RELIG 452 Topics In the Buddhism of Tibet (3) I&S *Pagel* Topics in the development of Buddhism of Tibet. Includes the relationship between reasoning and religious thought; the concept of a person, the formation of the different schools of Tibetan Buddhism; the notion of lineage; the master-disciple relationship in the tantric tradition. Recommended: ANTH 352, RELIG 202, RELIG 350, or RELIG 354.

RELIG 490 Special Topics (1-5, max. 15) I&S Topics vary with each offering.

RELIG 491 Seminar: Topics and Issues In Judaism (5) I&S *Jaffee* Topics vary. Recommended: RELIG 210; RELIG 400, RELIG 405, RELIG 410.

RELIG 492 Seminar: Topics In Early Christianity (5) I&S *Williams* Topics vary. Recommended: One early Christian history or literature course.

RELIG 497 Field Archaeology (1-10, max. 20) Professionally-guided archaeological fieldwork at a recognized archeological dig in the United States or abroad. Offered: S.

RELIG 498 Honors Thesis (5) I&S Required course for Comparative Religion honors students.

RELIG 499 Undergraduate Research (1-5, max. 15) Primarily for comparative religion majors and majors in the School of International Studies.

* * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOSHUA DAVEY, Plaintiff, v. GOVERNOR GARY LOCKE, individually and in his official capacity, et al., Defendants.	No. C00-61R ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

THIS MATTER comes before the court on a motion by plaintiff Joshua Davey ("Mr. Davey") seeking a preliminary injunction preventing defendants Gary Locke, Marcus Gaspard, Bob Craves, and John Klacik (collectively "the HECB"), from revoking his state scholarship because of his intent to use it to pursue religious instruction.[1] Mr. Davey claims that the HECB's policy intrudes on rights secured by the state and federal constitutions. The court having reviewed the pleadings filed in

[1] Counsel for Mr. Davey is directed to local rule CR 7(c), which clearly sets out the page limits applicable to non-dispositive motions such as this. The fact that Mr. Davey doubled the permissible length on both his opening and reply briefs without leave of the court has not gone unnoticed. Defendants have moved to strike the over length briefs. Although the court will not grant defendants' motion to strike, this is not prejudicial to their position given the court's denial of plaintiff's request for preliminary injunction. Mr. Davey is hereby put on notice that such flagrant disregard of the court's rules at any point in the future will not be tolerated.

support of and in opposition to the motion, along with the remaining record, finds and rules as follows:

I. BACKGROUND

The facts in this matter are essentially undisputed. Governor Gary Locke created the Washington Promise Scholarship (the "Scholarship") to facilitate college attendance by low to middle income students from Washington who ranked among the top 10% of their high school class. The Scholarship's value depends on the level of funding and the number of qualifying applicants. For the 1999-2000 school year, the Scholarship was worth $1,125. Under the terms of the Scholarship, students must enroll in an accredited four-year institution in order to be eligible. The Scholarship funds are sent directly to the qualifying student's school and held in his or her name. The student's institution must certify that the student is enrolled and eligible for aid before any funds may be released. All funds are to be put towards the student's educational expenses.

In 1999, Mr. Davey applied for and was awarded the Scholarship. He received a letter confirming his eligibility from defendant Marcus Gaspard in August of 1999, and an award certificate and congratulatory letter from Governor Locke in October of 1999. None of this correspondence mentioned conditions on the Scholarship related to the student's chosen field of study. Mr. Davey proceeded to enroll in the Northwest College ("Northwest"), a "Christian community of faith and learning" located in Kirkland, Washington, and declared a double major in Pastoral Ministries and Business Management.

Later in October of 1999, Northwest's financial aid director, Lana Walters, received a memorandum from the assistant director of the state's Higher Education Coordinating Board, Mr. John Klacik, informing her that, pursuant to RCW 28B.10.814 and the state constitution, "students who are pursuing degrees in theology are not eligible to receive *any* state-funded student financial aid, including the new Washington Promise Scholarship." Davey Decl., Exh. H (emphasis in original). That memorandum was accompanied by the certification form required from Northwest prior to release of funds to Mr. Davey. That certification itself required Northwest to affirm that "no student [receiving the Scholarship] is pursuing a degree in theology."

Mr. Davey was informed of this policy and that, if he pursued a degree in theology, the Scholarship would not be available to him. He adhered to his decision to pursue his chosen career. As a result, no Scholarship funds have been released to him.

Mr. Davey claims that Washington state's statutory and constitutional prohibitions on the use of state funds for religious instruction violate rights secured by the First and Fourteenth Amendments to the U.S. Constitution, and article 1 §§ 11 and 5 of the state constitution. He seeks a preliminary injunction from this court ordering the HECB to reinstate his Scholarship. He claims he will suffer irreparable injury in that he must work an additional 2.5 hours each week at his after-school job during the 1999-2000 school year in order to make up for the loss of this $1,125 Scholarship.

II. PRELIMINARY INJUNCTION STANDARD

A party seeking preliminary injunction must demonstrate either a substantial likelihood of success on the merits coupled with the threat of irreparable harm, or that serious questions are raised as to the merits and that the balance of hardships tips in favor of the claimant. *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1119 (9th Cir. 1999); *Roe v. Anderson*, 134 F.3d 1400, 1402 (9th Cir. 1998). Ordinarily, preliminary injunctions are designed to preserve the status quo. *Roe*, 134 F.3d at 1402. A further consideration in cases such as this is whether the moving party has an adequate remedy at law. *Walters v. Reno*, 145 F.3d 1032, 1048 (9th Cir. 1998). If monetary damages or other available legal remedies will cure the moving party's injuries, then preliminary injunction should be denied. *Id.*

III. DISCUSSION

A. The Status Quo

Mr. Davey claims that the status quo will be restored by reinstating his Scholarship. The defendants point out that the status quo in Washington, since 1969, has been that "no aid shall be awarded to any student who is pursuing a degree in theology." RCW 28B.10.814. According to the HECB it is this litigation that challenges the status quo.

The court agrees with defendants. What Mr. Davey is seeking is more correctly characterized as a mandatory injunction from this court ordering the HECB to change a constitutional interpretation in effect for more than three decades.

B. The Threat of Irreparable Harm

Mr. Davey claims that he is irreparably harmed by the denial of his Scholarship. Mr. Davey does not allege that he is unable to attend college, pay tuition, or purchase books or supplies. What he claims is that he must work an additional 80 hours over the school year in order to make up for the Scholarship he had anticipated. Mr. Davey argues that these extra work hours take him away from his studies and other school pursuits. In essence, Mr. Davey claims that "the foregone hours of study and free association are irretrievable and comprise irreparable harm . . . that justifies issuing a preliminary injunction." Plaintiff's Reply in Support of Motion at 2.

The court disagrees. Many students work their way through college each year, and do so while successfully studying and enjoying association with their peers. Moreover, even with the Scholarship, Mr. Davey planned to work approximately 23 hours per week during school. Davey Decl. at 8. It appears that he may have to work an additional 2.5 hours per week, assuming two sixteen week semesters, in order to compensate. This additional burden does not constitute the irreparable harm necessary to justify the issuance of injunctive relief. Nor is the court able to say at this stage of the proceedings that Mr. Davey's likelihood of success on the merits is so great as to warrant injunctive relief absent irreparable injury.

Furthermore, Mr. Davey's true harm is that he has not received $1,125 during the 1999-2000 school year. If Mr. Davey prevails on the merits of him complaint, his injury can be cured by monetary

damages, including interest on the amount he is owed. There being an adequate remedy at law, injunctive relief is unwarranted. *Walters v. Reno*, 145 F.3d 1032, 1048 (9th Cir. 1998).

C. Balance of Hardships Test

An alternate test for assessing whether an injunction is warranted requires the movant to demonstrate that serious questions are raised by the motion, and that the balance of hardships tips in the movant's favor. *Roe v. Anderson*, 134 F.3d 1400, 1402 (9th Cir. 1998).

The court agrees that this case presents important questions involving both the federal and state constitutions that deserve the most thoroughgoing consideration. However, the court finds that the balance of hardships does not tip in favor of Mr. Davey.

As discussed more fully above, the court is hard-pressed to find any significant cognizable hardship imposed by the defendants' denial of Mr. Davey's Scholarship. Mr. Davey does not claim to have been unable to afford any expenses related to his education. Instead, he claims hardship in having to work 2.5 hours per week in addition to the 23 hours he had planned to work before this dispute arose. To reiterate, this hardship is a burden successfully borne by many college students each year.

IV. CONCLUSION

For the above reasons, Mr. Davey has demonstrated neither the requisite threat of irreparable harm, nor that the balance of hardships favors injunctive relief. Mr. Davey's motion for

preliminary injunction [docket 10-1] is, therefore, DENIED.

DATED at Seattle, Washington this 17th day of March, 2000.

//s//
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DECLARATION OF EUGENE WEBB, Ph.D.

[Caption Omitted In Printing]

EUGENE WEBB Declares as follows:

1. I am a Professor of Comparative Religion and Comparative Literature at the University of Washington. I have been at the University of Washington since 1966. I was promoted to Associate professor in 1970 and full Professor in 1975. My home department since 1975 has been the Henry M. Jackson School of International Studies (which in 1975 was named the Institute for Comparative and Foreign Area Studies). I am over the age of eighteen, and am competent to testify to the matters herein.

2. I began teaching religion classes at UW in Autumn 1974 with RELIG 201, our historical survey of western religious traditions, including the religions of ancient Mesopatamia and Egypt, Israel, Persia, Greece, Christianity, Rabbinic Judaism, and Islam. In Spring 1975 I began teaching RELIG 380, our course on theories and methods in the study of religion. In 1980 I added RELIG 301, Religious Thought Since the Middle Ages, and sometime in the later 1980s, RELIG 428, Modern Christian Theology. In 1992 I added RELIG 327, Eastern Christian Traditions (mainly about Eastern Orthodoxy). I was the originator of all of these courses. I continue to teach these courses, and have taught all of them within the last three years.

3. None of our courses are devotional in nature or designed to induce religious faith. The reality is quite the contrary: occasionally, when students raise questions about the truth or ultimate reality of religious ideas, I remind them that our concern in these courses is not with truth but only with the meanings of the ideas—that is, the various ways in which they have been interpreted and reinterpreted over time in the lives of religious communities. Religious ideas are studied in our courses as an aspect of the general intellectual and cultural history of societies and civilizations.

4. I organized the Comparative Religion Program in the academic year 1973-74 as a program in the Institute for Comparative and Foreign Area Studies. Its first courses were offered in 1974-75. We were authorized by the state to grant a BA in Comparative Religion in Spring 1975, and we granted our first BA in June of that year.

5. From the time I organized the Comparative Religion Program at UW it was absolutely clear that the state constitution prohibited any use of state funds, for education or any other activity, that might be designed to induce religious belief in students. The immediate background of the founding of the program was a court case that went to the supreme court of the state of Washington and the [sic] culminated in the judgment that "just as a state university may teach political science but may not advocate a political position, so a state university may teach theology but not advocate a theological position." That judgment cleared up what had previously been a misimpression that we could not teach anything at all about the religions of the

world. We have since taught about religions from a historical and strictly scholarly point of view. Questions of personal faith are the private business of the students and teachers and are not discussed at all in our classes.

I declare the foregoing is true to the best of my knowledge under penalty of perjury under the laws of the State of Washington.

Signed at Seattle, Washington, this 9th day of August, 2000.

//s//
Eugene Webb. Ph.D.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DECLARATION OF JOHN KLACIK

[Caption Omitted In Printing]

JOHN KLACIK Declares as follows:

1. I am Associate Director of Education Services for the Washington State Higher Education Coordinating Board ("HECB"). I am over the age of eighteen, have personal knowledge of the matters declared herein, and am competent to testify of these matters.

2. My duties as Associate Director of Education Services include overseeing the HECB implementation of State of Washington financial aid programs, including among other programs the Promise Scholarship. I am familiar with the HEBC [sic] requirements that both public and private institutions of higher education must meet before their enrolled students may receive funding under the Promise Scholarship.

3. I have never asked Lana Walter, or any other financial aid director, to require students to sign a Condition of Award letter as a prerequisite to receiving Promise Scholarship funds. The only signature required by the HECB for Promise Scholarship funding is a certification by the institutions themselves regarding the eligibility of the students seeking funding.

I declare the foregoing is true to the best of my knowledge under penalty of perjury under the laws of the State of Washington.

Signed at Olympia, Washington, this 8th day of August, 2000.

//s//
John Klacik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DECLARATION OF BECKI COLLINS

[Caption Omitted In Printing]

BECKI COLLINS Declares as follows:

1. I am the Director of Education Services for the Washington State Higher Education Coordinating Board ("HECB"). I am over the age of eighteen, have personal knowledge of the matters declared herein, and am competent to testify to these matters.

2. My duties as Director of Education Services include overseeing the operational areas of the HECB. Specifically, this includes overseeing the HECB implementation of State of Washington financial aid programs, including among other programs the Promise Scholarship. I am familiar with the HEBC [sic] requirements that both public and private institutions of higher education must meet before their enrolled students may receive funding under the Promise Scholarship.

3. There are currently 85 institutions set up to receive Promise Scholarship funds, including 42 private or proprietary institutions. Attached hereto is a list of those institutions. The total number of accredited institutions at which a student could receive Promise Scholarship funds is higher than the 85 institutions currently set up, and thus this number could increase in the future.

4. I have reviewed Exhibit 1, pages 17 through 48, and pages 78 through 82 of the deposition transcript of Lana Walter.

5. The HEBC [sic] has never requested institutions of higher education to gather signed "condition of award" letters certifying that the student will not pursue a degree in theology as a condition to disbursement of Promise Scholarship funds. Further, the HECB has not requested or required that institutions gather any other student-signed document as a condition to enrolled students receiving Promise Scholarship funds.

I declare the foregoing is true to the best of my knowledge under penalty of perjury under the laws of the State of Washington.

Signed at Olympia, Washington, this 9th day of August, 2000.

//s//
Becki Collins

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DECLARATION OF GARY S. MCCALEB IN SUPPORT OF PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE OPPOSING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

[Caption Omitted In Printing]

Dated August 16, 2000

* * *

Exhibit B

[NORTHWEST COLLEGE LETTERHEAD]

Financial Aid Services
Fax Cover Sheet

Date: *7/21/00*
Attention: *Gary McCaleb – Staff Counsel*
Business: *American Center For Law and Justice*
Fax Number: *(480) 596-0831*
From: *Brian*
Number of pages including cover sheet: *2*

If all pages are not received, please call the Financial Aid Services Office at (425) 889-5210.

Notes:

Gary, Lana Walter wanted me to fax this Washington Promise Scholarship Conditions of Award. If you have any questions, go ahead and give us a call. Thanks.

Brian

WASHINGTON PROMISE SCHOLARSHIP CONDITIONS OF AWARD

You are being considered for a state of Washington Promise Scholarship. In order to receive this scholarship, if awarded, you must certify that you will comply with the CONDITIONS OF AWARD by signing the statement below.

I, THE UNDERSIGNED, CERTIFY THAT:

1. I am a resident of the state of Washington, in accordance with RCW 26B.15.011-013 [sic];
2. I am registered at this institution as at least a half-time undergraduate student and am making satisfactory progress toward completion of my degree or program objective;
3. I have applied for a federal Pell Grant;
4. I am not pursuing a degree in theology;
5. I do not owe a refund or repayment of a State Need Grant, a Pell Grant, or a Supplemental Education Opportunity Grant, nor am I in default on a loan made, insured, or guaranteed under the Perkins, National Direct, or Federal Family Education Loan programs. In addition, I am not in default on a loan made through a state conditional loan program;
6. I agree to notify the Financial Aid Office immediately of any change in my address or in my financial status;
7. I understand that this scholarship is awarded to assist in meeting educational expenses; and should I withdraw from classes, repayment of all or a part of the scholarship may be required;

8. I understand that when I am able, I can voluntarily make financial contributions to the Higher Education Coordinating Board in recognition of the WASHINGTON PROMISE SCHOLARSHIP and that these gifts will be used to provide financial assistance to other students; and
9. I understand that the offer of a WASHINGTON PROMISE SCHOLARSHIP is subject to and conditioned upon the availability of funds. Further, I agree that the Higher Education Coordinating Board and this institution reserve the right to withdraw, reduce, or modify the scholarship due to funding limitations or due to changes in circumstances which affect my eligibility for the WASHINGTON PROMISE SCHOLARSHIP.

SIGNATURE: _____ DATE: _____

PRINT: _____ ___/___/____

(Last Name) (First Name) (MI) Social Security Number

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DECLARATION OF GARY S. MCCALEB IN SUPPORT OF PLAINTIFF'S MOTION FOR AN INJUNCTION PENDING APPEAL

[Caption Omitted In Printing]

Dated October 25, 2000

* * *

Exhibit A

[Higher Education Coordinating Board Letterhead]

August 18, 2000

JOSHUA DAVEY
10424 E 5TH AVE
SPOKANE WA 99206

Dear Joshua:

Congratulations! On behalf of Governor Gary Locke and the Washington Legislature, I am pleased to inform you that you are eligible to receive the Washington Promise Scholarship.

The value of the award is $1542 for the 2000-2001 academic year. Your scholarship will be disbursed in equal amounts at the beginning of each academic term from fall through spring. You should be prepared to cover all educational costs until the scholarships are disbursed.

To receive the scholarship you must meet the following enrollment requirements:

- Attend an eligible postsecondary institution in Washington State;
- Enroll at least half-time; and
- Not be pursuing a degree in theology.

Eligible institutions include accredited public and private colleges, universities, and career training schools. Please review the enclosed information sheet title "How the Promise Schclarship Will Be Disbursed" for additional information.

If you have questions about the scholarship, disbursements, enrollment requirements, or eligible schools, please contact us toll-free at (888)-535-0747 or by email at wapromise@hecb.wa.gov. Again, congratulations on your scholarship.

Sincerely,

//s//
Marcus S. Gaspard
Executive Director

MG:dl

Exhibit B

[NORTHWEST COLLEGE LETTERHEAD]

October 2, 2000

Joshua Davey
Box 29
[sic]

Dear Joshua:

Greetings from Northwest College and the Financial Aid Services Office. This letter is in regards to the Washington State Promise Scholarship.

You were selected by the State of Washington as a potentially eligible Washington State Promise Scholarship recipient. To complete the eligibility process, the State requires Northwest College to certify that students receiving this award are not majoring in theology. As you may or may not be aware, the Washington State constitution strictly regulates separate [sic] of church and state and, therefore, state funds are not to be issued to students majoring in religious studies.

It is our understanding from the Registrar's Office that you have declared a major in religious studies. Consequently, Northwest College is unable to request funds for the Washington State Promise Scholarship. Our office is very sorry to inform you of this, but the State of Washington has charged us with the responsibility of informing you of this regulation.

If you have any questions regarding this matter, then please give me a call at x4090 or email me at brian.renney@ncag.edu. Thank you.

Sincerely,

//s//
Brian Renney
Financial Aid Counselor

[1]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

[Caption Omitted In Printing]

EXCERPTS OF DEPOSITION OF JOSHUA DAVEY
Thursday, June 15, 2000

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* * *

[10]

* * *

Q [BY MR. SHINN] And how did you come about deciding where you were going to work and how much you were going to work?

A When I arrived on campus to enter the residence halls, I sought out a job on campus for the convenience. And I applied and received the maintenance job.

Q And how many hours a week were you working, about, in the maintenance job?

A I worked approximately 20 hours per week.

Q And was that pretty consistent during the three-month period that you worked there?

A That was fairly consistent, yes.

Q And why did you change jobs looks like during November of 1999?

A Yes, it was during November. The reason I changed is I did not enjoy, particularly, the maintenance job, so I was seeking something that would pay a little more.

Q And at that point, you went to work for the Yarrow Bay Grill?

A Yarrow Bay Grill, yes. Difficult pronunciation.

Q Thank you for the correction. What were you doing there?

[11]

A I worked as a busser.

Q And looks like you earned an hourly wage plus tips?

A That's correct.

Q And how much did you work there?

A On the average, I worked 25 hours per week.

Q So you were working a few hours a week, about five hours a week more than you previously had?

A Yes.

Q And why was that?

A The reason I chose to do that was because of the way the restaurant scheduling is. You don't get certain hours. You just get a time when you arrive at work, go home when people leave the restaurant. And since I wanted to the work a certain number of nights, that resulted in a 25-hour-per-week schedule.

* * *

[27]

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Q Is it fair to say that what you're claiming in this lawsuit is that the Promise Scholarship restriction is adversely affecting your spiritual development?

A Yes, that's fair to say that.

Q And is it also fair to say that your course of study is designed to prepare you for a career in which you'll be promoting Christianity?

A Yes, that is fair to say.

Q Well, let me introduce another term, and I appreciate your bearing with me in helping me to define these terms.

Is "clergy," is that a term that's applicable to those who are pastors or ministers? Are they members of the clergy?

A Yes, that would be applicable.

[28]

Q So your education, then, would be preparing you for the clergy; is that right?

A Preparing me to be a member of the clergy, yes.

Q How did you declare your major?

A Upon registration for classes at Northwest College, students are offered the opportunity to declare a major at that point. When I registered for fall 1999 semester, I declared my major.

Q And did you do that by checking a box on a form? What was the actual conduct?

A There was a line on the registration form labeled "major," and students wrote in their choice.

Q And what did you write in on that form?

A I wrote on that form, pastoral ministry and business management and administration.

Q And in doing that, where did that form go when you were finished filling it out? Who did you give it to? I can't expect you to know where it went after that, but what did you do with the form when you were done with it?

A When I was finished with the form, I gave it to a faculty advisor who was there to help students register for classes.

Q Do you know where it went after that?

A I am not really sure. Probably the registrar's office.

[29]

Q Did you tell anybody what major you had filled in on that form?

A I don't remember telling anyone specifically.

Q Do you recall generally?

A I probably told quite a few people. It was just a common conversation topic.

Q From your general recall, is it fair to say that that would have been a subject that came up in social conversations?

A Yes.

Q And you don't recall it coming up in any other kind of situation?

A What type of situation do you mean?

Q Aside from these general conversations or these social situations that you generally recall.

A No, I don't recall any other specific instances.

Q Why did you declare that major? Is it two majors? Is that how --

A Yes, it is two majors.

Q Why did you declare those majors?

A The reason I declared those majors was that I knew what I wanted to study, and I believed those would best equip me to be a member of the clergy.

* * *

[33]

Q So to the best of your recollection, you never saw a form from Lana Walter; she was just talking about it?

A As I can recall, that's correct.

Q Okay. But she did indicate that she had a form for you to sign?

A She indicated that she had the form if I chose to sign it.

Q And I think we can take it that you did not choose to sign the form?

A That is correct.

Q So was it your understanding from your conversation with Lana Walter that Northwest College considered your pastoral studies major to

be pursuing a degree in theology, as that applies to the Promise Scholarship?

A My understanding from my conversation with Ms. Walter was that the State considered Northwest's pastoral ministries degree to be pursuing a degree in theology. I did not understand exactly how that decision was made, whether it was made by the State or by Northwest College.

Q At that time, did you dispute whether the pastoral studies major was pursuing a degree in theology, as that applies to the Promise Scholarship?

A No, I did not dispute that.

Q Do you dispute that at this time?

[34]

A No, I don't.

Q When you had the conversation with Ms. Walter, did you ask her what majors were considered to be pursuing a degree in theology?

A I did not ask her what majors specifically would be considered to be pursuing a degree in theology. I relied upon a more generalized understanding.

Q Did you have any difficulty coming to that general understanding of what pursuing a degree in theology meant to you?

A No. From my understanding of what the State would consider to be church related or theology related and looking at what Northwest's program entailed, I felt that I understood what the State was getting at by saying that program wouldn't be covered by the scholarship.

Q Tell me what else you recall of that conversation with Ms. Walter.

A I recall her saying that there were three other Northwest College students put in my same position. Having to choose, I mean.

Q And did she tell you who those three students were?

A No. She didn't give me any names.

* * *

[36]

* * *

A I believe I know one name.

Q Which student is that?

A I believe his name -- I know his name is Luke Glidden. That's G-l-i-d-d-e-n. And I believe him to be one of the other students.

Q Tell me why you think that.

A After the news of a lawsuit reached the papers and the school, he approached me on campus and told me that the same thing had happened to him.

Q What do you recall of that conversation?

A He told me that he wanted to join with me in my efforts to recover the funds and have the law changed.

Q Do you recall anything else? How did you respond?

A I told him that that would probably be a good thing, and I gave him Mr. McCaleb's phone

number and told him that if he was seriously interested, he should give him a call.

Q And how did Mr. Glidden reply, if he did?

A He said thank you, and I believe he did contact my attorney.

* * *

[38]

* * *

Q And aside from Ms. Walter, am I correct in understanding you haven't had any conversations or any communications with any other Northwest College officials regarding your eligibility for the Promise Scholarship?

A No, I haven't talked to anyone else.

* * *

[41]

* * *

Q So would I be right in understanding that the courses are taught to you with the message being that the Bible provides the blueprint, if you will, or guidance for how a subject should be understood?

A Yes, I believe that's a fair statement.

Q Is it a part of the instruction that you've been in at Northwest College that instructors will indicate that a particular religious approach to an issue is the correct approach?

A I am not sure I really follow you.

Q In your courses, have your instructors indicated in their teaching to you that the Bible provides a particular answer to a given particular question?

A To some given questions, it's very clear and does provide a very specific answer. Others, other questions a person must take into account their understanding of the overall message of the Bible and the principles therein and apply those and come to a conclusion.

* * *

[44]

Q In your courses, is it the norm for other points of view to be expressed, opposing points of view, to how the Bible would have you act?

A I believe the professors in general make it a point to express opposing points of view to deal with those questions that, well, that others hold different views on. It only makes intellectual sense, I guess.

Q Can you describe for me, please, the difference, as you see it, between Northwest College and other nonreligiously affiliated colleges.

A I see many differences. I don't know exactly what you mean.

Q Do you see a fundamental difference between Northwest College and, say, a public university?

MR. MCCALEB: Objection. Vague.

Q It is vague, but go ahead and answer if you understand my question. And then maybe we can figure out a more specific question.

A I do see a fundamental difference.

Q And what fundamental difference do you see, and how would you describe that to me?

A I believe the fundamental difference would exist in the school's view of the Bible, their aims in instructing from it or instructing in any religious classes, and their goals as an institution for their students.

[45]

Q How would you characterize your perception of the different views of the Bible between Northwest College and a public institution?

A Whereas Northwest College used the Bible to be the ultimate source of truth and authority for any matter that it directly expresses, and the foundation for which to understand other questions of learning – we kind of discussed that idea -- that's Northwest's view of it. Whereas any given public institution, as a generalization, wouldn't view the Bible necessarily to be ultimate truth, but one of many writings or books that some have claimed to be ultimate truth.

Q And how would you characterize your understanding of the differing aims in instructing from the Bible between Northwest College and the public institution?

A I believe the aim of Northwest College in instructing from the Bible is to help its students grow in their understanding of the Bible, become more mature Christians, to become more -- well, to become better educated individuals in all matters, and to prepare their students to live

lives in service to God and others that make a serious difference in the world.

Q And that's the Northwest approach. How do you perceive the difference between that and the public institution's approach?

[46]

A In general, I believe a public institution's goal in teaching from the Bible would be to present the viewpoints of some in an intellectual fashion, not necessarily as truth or as something that should impact a person's life; but, instead, as a belief and system of worship of a significant number of people.

Q And when you were describing the Northwest College aim in instructing from the Bible as you understand it, you said part of your answer was that it would allow students to live their lives in service to God.

Is that an accurate restatement of part of the instructional purpose?

A I think a more accurate would be to better facilitate them to live their lives in service to God.

Q And that would be in service to God as instructed in the Bible; is that right?

A Yes, that's correct.

Q And, finally, how do you see the difference in the goals of the institutions between Northwest College on one hand, and public institutions on the other hand?

A I see the goal, what I believe would be the goal of Northwest College would be to produce students

who are not only academically -- well, not only well educated, but also well equipped to serve God with their lives, better facilitated through their education to serve

[55]

* * *

Q Would you please, Mr. Davey, take a moment to read the description of Exploring the Bible.

Have you had an opportunity to do that?

A I have.

Q Does that description describe the course as it existed when you took the course last fall?

A I believe that's a fair description of the course that I took.

Q And is it fair to say that the course's intent of helping the student understand the plan of redemption evident in both Testaments is different than a purely academic consideration of the Bible?

A I believe that is somewhat different, yes.

Q And can you tell me, can you articulate that difference for me.

A I believe that understanding the plan of redemption evident in both Testaments of the Bible as is intended by Northwest College requires taking the Bible as truth, as foundational. Whereas a purely academic understanding would not necessarily subscribe to the Bible as ultimate truth.

* * *

[58]

Are those courses that you'll be taking as part of your major course of study?

A Most of those are, yes.

Q Can you tell me which ones of those you expect to take.

MR. MCCALEB: Objection, based on continuing objection I have in that this is a prior catalog from '98-99 and they may not be accurate descriptions. But go ahead and answer.

A I have already taken the first one on that list, Christian Doctrine. I anticipate taking Pentecostal Doctrines, Systematic Theology I and II.

Q Can you briefly describe for me what the Pentecostal doctrines are. Maybe it's not fair because you haven't had the class yet, and you can amend it later after you have taken the class. But can you currently describe what those doctrines are? And, again, just briefly, if you would.

A I'm not sure as to what exactly the subject matter of that class or those doctrines are.

Q Okay. Is chapel attendance, is that a part of the expectation of the students at Northwest College?

A Chapel attendance is required for Northwest College students.

Q How often do you attend chapel?

A Students are --

[59]

Q Let me rephrase the question, maybe make it a little more specific. How often are you required to attend chapel?

A There are a given number of chapel days each semester. Currently, students are allowed six misses.

Q Is that changing at some time? It sounds like maybe there's a change in program.

A I don't know of any change in the works. That is a change from the practices that were in place in this catalog.

Q And during the time that you've been a student at Northwest College, has the allowance of missing chapel six times per semester been in place?

A Yes, that's been the policy.

Q So it changed before you started attending?

A Yes, that's correct.

Q About how often per semester is chapel required? Or can you describe to me maybe how often are the chapel days that you talked about.

A Chapel is generally held three times a week: Monday, Wednesday, and Friday. Occasionally, additional chapel days are added on a Tuesday or Thursday for special events.

Q And can you briefly describe to me what the chapel entails.

[61]

* * *

Q Okay. So it should read:

> "When students apply for admission, they must indicate that they have made a personal commitment to Jesus Christ as Lord and Savior and that they are willing to live by the community rules adopted by the College."

Does that still describe, as you understand it, an expectation of students at Northwest College?

A As I understand it, that is still an expectation.

Q Based on the grades that you got during the first year at Northwest College, are you receiving or eligible for any additional scholarships?

MR. MCCALEB: Objection to the extent it calls for speculation. Go ahead and answer.

A Eligible for, possibly. Receiving, no.

Q Are there any scholarships that you're aware of that you might, for a straight A grade point average, make you eligible for?

A I'm not aware of any scholarships specifically.

* * *

[62]

Q I'm going to ask you a couple more questions about what we defined earlier as the Promise Scholarship restriction. That was referring to the restriction on those students who are pursuing a degree in theology.

Do you believe that the Promise Scholarship restriction is addressed to your religious beliefs?

A Yes, I do.

Q Can you explain that to me, please.

A I believe that the Promise Scholarship restriction singles me out from other students like myself in terms of educational qualifications, and forces me to either choose to deny what I hold as sincere religious beliefs to pursue a degree in theology, or -- either deny those beliefs at the expense of funding for which I would otherwise be eligible.

Q And in saying that it singles you out from other students like yourself, can you explain who you are singled out from among.

A I believe I'm singled out from all other Washington Promise Scholarship recipients who had similar GPAs, similar test scores, and similar income levels.

Q And do you believe that that is because of your religious beliefs?

A Yes.

Q And how is that tied to your religious beliefs?

[63]

A My religious beliefs -- I think we talked about this at the beginning of the deposition, too -- require me to commit myself fully to what I believe is God's intention and desire for my life, which requires me to pursue a degree in pastoral ministries and continue on to a career as a pastor.

Q I am going to ask you a question that Mr. McCaleb will likely object to, but answer it anyway if you can.

Do you believe your rights would be violated if your religious beliefs required you to attend a nonaccredited institution of higher education?

MR. MCCALEB: Objection. Calls for a legal conclusion. And, yes, go ahead and answer.

A Can you state that one more time.

Q Let me set up a little bit of foundation for you here.

The Promise Scholarship has several requirements. One of those requirements is that you be attending an accredited institution of higher education.

My question is, would you believe that your rights were violated if your religious beliefs required you to attend a nonaccredited institution of higher education?

MR. MCCALEB: Same objection.

A Do you mean would my rights be violated in the sense that I would not receive the Promise Scholarship, but this time for a different reason?

[64]

Q Yes, that's exactly what I'm kind of getting at. If the reason was that, rather than the fact that you are pursuing a degree in theology, but that your religious beliefs required to you attend a college that was not accredited, would that similarly violate your rights, do you believe?

MR. MCCALEB: Same objection, as well as ambiguous, vague, and calls for speculation. But go ahead and answer.

A If my religious beliefs required me to attend a nonaccredited institution and because of that I became ineligible for the Washington Promise Scholarship, I believe that my rights would be violated.

Q The lack of the Promise Scholarship funds that you experienced hasn't prevented you from pursuing your chosen major of pastoral ministries, has it?

A No, it has not prevented me from pursuing that major.

Q And is it consistent with your understanding that if your major was something other -- if your major was only business administration, is it consistent with your understanding that you would be eligible for the Promise Scholarship regardless of your religious beliefs or lack thereof?

A It is my understanding that if I was only a business major, I would be eligible to receive the Washington

[65]

Promise Scholarship.

Q And that's true without respect to whether you identify yourself as a Christian?

A Yes.

Q Has anyone at any time indicated to you that the Promise Scholarship would require you to refrain from discussing your religious beliefs?

A No, no one has indicated that to me.

Q And has anyone at any time ever indicated to you that the Promise Scholarship would require you to refrain from associating with any particular individuals?

A No one has overtly expressed that to me.

Q Has somebody covertly expressed that to you?

A I believe that is implied through the nature of the scholarship restriction; that in denying students the funds to pursue their chosen degree in theology, a restriction was placed on them in terms of who they can associate with because of the practical reality that for some students, lack of those funds may prevent them from attending the institution they would have otherwise chosen.

Q Does that restriction apply to you?

A I'm not sure I understand.

Q My understanding of that, of what your answer is, was that it could restrict you from associating with

[66]

persons because it could restrict you from attending your chosen institution. Is that accurate?

A I believe that is accurate. And, in addition, it could require some students to, even if they were able to attend their chosen institution, for want of funds they may have to spend more time working, which would cut into their time and ability to associate with others who they might have otherwise chosen to associate with.

Q So you have articulated two separate restrictions; the first being that you may not be able to attend the institution of your choice. That doesn't apply to you personally, does it?

A That restriction does not apply to me personally.

Q But it is your contention that the second restriction you've articulated, that you're not free to spend as much time associating with those you would choose to associate with, is a result of the Promise Scholarship restriction, right?

A Yes, that is correct.

Q And you were already planning on working to some extent, regardless of receiving or not receiving the Promise Scholarship, right?

A To some extent, yes.

Q Has anybody ever told you that the Promise Scholarship restriction is designed to prevent you from spending as

[67]

much time as you'd like to associating with those who you choose to associate with?

A No one has ever explicitly stated that to me.

Q Do you have any reason to believe that that is the intent of the Promise Scholarship restriction?

MR. MCCALEB: Objection to the extent it calls for speculation.

Q And what I'm interested in is if you have reason to believe that.

A Do I believe that the Promise Scholarship restriction is intended to prevent students from

associating with certain people when they might otherwise?

Q Right.

A I don't believe that is the intent of the restriction.

Q What would you believe the intent of the restriction to be?

MR. MCCALEB: Objection to the extent it calls for a legal conclusion, speculation, and lack of foundation. Go ahead and answer.

A I'm not entirely sure what the restriction intent is. But I believe it has something to do with preventing State money or government money from being given to students who are interested in pursuing theological or religious degrees.

* * *

[70]

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Q And you don't know the names of those two students, right?

A I do not.

Q And do you know of any other students attending other institutions who have chosen not to pursue a particular major so that they will be eligible for Promise Scholarship funding?

A I don't know of any other such individuals.

Q Do you know of any other individuals who have attended other institutions besides Northwest College who did not receive Promise Scholarship funding because they were pursuing degrees in theology?

A I don't know of any other students personally in that situation.

Q I'd like you to explain to me the damages that you are claiming in your lawsuit. How do you claim that you were damaged by not receiving the Promise Scholarship funds?

A A more thorough articulation of those damages is in this document, which is -- I forget what it's called -- the declaration. Of course, I agree with everything that I said previously.

[71]

The damages have been financial, in that I have been unable to pursue some of the things I would have liked to pursue at college as part of the college experience because of the need to work a little more for lack of funds.

They have been against what I -- what I feel are my rights guaranteed by the Constitution of free speech and association, in that they have limited what I see as an expression of my speech in choosing my major and forced me to choose between expressing myself in that way or giving up that right.

I guess the freedom of assembly or association because of time spent -- unable to spend with other students, professors who would enhance my college experience.

And in every other way articulated in the declaration.

MR. MCCALEB: I have to enter an ex post facto objection there that when you said damages, I was thinking in terms of the legal

term of art, "money," not realizing we would step into some areas that I think would bar a legal conclusion. So I would object on the basis of a legal conclusion to the prior answer.

* * *

[73]

aside from those that I've stated in declaration and to you now, I know of no other ways in which I've been damaged.

Q Do you contend that the Promise Scholarship restriction coerced you into acting in ways that are contrary to your religious beliefs?

A No, I don't believe that the restriction coerced me. It did require me to choose between my religious beliefs and the scholarship money.

Q But it's accurate to say that the restriction did not coerce you to act contrary to your beliefs; you didn't have to, as an end, act contrary to your beliefs?

MR. MCCALEB: I object on the basis it does call for a legal conclusion.

A I would say it's an attempted coercion, but not one that I chose to give in to.

Q So you were not coerced into acting contrary to your religious beliefs; is that right?

MR. MCCALEB: Same objection.

A No, I was not.

Q Is it contrary to your religious beliefs to work during the time that you're in school?

A No, I don't think so.

Q You're getting married shortly. Have you incurred expenses that are related to the wedding?

[74]

MR. MCCALEB: Objection. Relevance. Go ahead and answer.

A I have, yes.

Q And what are those, briefly, if you will?

A Those expenses would be for some portions of the wedding, honeymoon, moving, buying items for the house, dishes and that kind of thing. And those kinds of expenses that one would normally encounter when getting married.

Q Have you personally ever attended any other any religion classes at any other institutions of higher education?

A I have not.

* * *

Q Can you explain to me a little bit more how you believe your rights to freedom of speech have been affected.

MR. MCCALEB: Objection to the extent it calls for a legal conclusion.

A Again, I refer to the declaration. And I believe that my action to choose my major as pastoral ministries over receiving the Washington Promise Scholarship is an overt expression of speech that I am making this choice, and I don't feel I should have to hide it in

[75]

any way. And that through asking me to make that choice at the expense of the scholarship money, or to choose the scholarship money at the expense of what I really wanted to pursue in college, is a violation of my right to free speech.

Q Any other ways that are not addressed in your declaration or that you haven't told me about today?

MR. MCCALEB: Same objection.

A Again, I would just refer to the declaration. And at this time, I cannot think of any other ways.

MR. SHINN: I don't have any further questions.

(Deposition concluded.)

(Signature reserved.)

[2]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

[Caption Omitted In Printing]

EXCERPTS OF DEPOSITION OF MARCUS GASPARD
Monday, May 1, 2000

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[21]

* * *

Q. [BY MR. MCCALEB] Do you want me to rephrase the question? I was only using the document to bring out the criterion within the Washington Promise Scholarship that there is a restriction: You do not receive the scholarship if you are pursuing a degree in theology. So in that context of a restriction on the ability to receive scholarship funds, what does it mean to be pursuing a degree in theology?

A. We were -- this refers to the law as we understand it with regarding financial aid eligibility for citizens of this state, and there is a restriction for those who would pursue a degree in theology. And we were applying that same standard of eligibility to the Promise Scholarship. In other words, obeying the law as we understood it.

Q. Are there any other programs administered by the HEC Board that prohibit receipt of funds based upon a subject matter that is either studied or not studied?

A. That would apply to financial aid programs from the state that we are responsible for administering. The State Need Grant would be the

[31]

A. Yes, at least I was on one occasion that I could recall, again, somebody of those three individuals that I mentioned had said there had been a conversation with the aid administrator.

Q. And what is the gist of the conversation that you recall?

A. As I recall there was a discussion about Mr. Davey's major, and if he were to major in theology that he would not be eligible, that he does not have to declare his major at this point.

Q. What effort was made to advise Mr. Davey that he did not have to declare a major?

MR. SHINN: Objection, calls for speculation.

You can go ahead and answer.

A. I couldn't answer that question because I wouldn't know.

* * *

[2]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

[Caption Omitted In Printing]

EXCERPTS OF DEPOSITION OF JOHN KLACIK
Monday, May 1, 2000

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* * *

[10]

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Q. [BY MR. MCCALEB] Are there any other criteria bearing upon a person's eligibility to receive funds under the scholarship?

A. Well, to be a recipient -- to be a recipient, the student must also attend an eligible institution, must enroll for at least six hours or more and cannot pursue a degree in theology.

Q. And could you define "pursue" in that context?

A. It's the institution's decision as to whether or not a student is pursuing a degree in theology, so the institution's examination of the student's record, enrollment.

Q. And could you define a degree in theology in this context?

A. In this context it's, again, the institution's decision to take a look at that law 20 and determine how it applies at their institution.

Q. When a scholarship recipient is awarded this scholarship, does a scholarship affect other financial aid that person might have such as need-based aid?

A. It may.

[12]

Q. Are you aware of any public recognition events?

A. Yes.

Q. And what would those be?

A. The Governor held five recognition events across the state.

Q. Were those regional events or how were they organized?

A. I don't know.

Q. What is the nature of the event?

A. It was a ceremony to present -- just to recognize the scholars at five schools at which he appeared. And I believe that he also handed them a certificate at that point.

Q. Okay. In your answer to us you responded to the Complaint. I have copies here to refer to if you wish. There are a couple of statements that I would like to ask you about.

I specifically direct your attention to Page 10 of the defendant's answer to us. And in Paragraph 7, Page 10 of the answer, you allege: That in declaring a major in theology, the plaintiff, Mr. Davey's, sole purpose was to create a case or controversy for purposes of litigation only.

My question is what facts or

[13]

information do you base that allegation on?

MR. SHINN: I'm going to object to the question as far as calling for a legal conclusion regarding the answer the defendants filed regarding, I guess, clarifying whether this was an answer filed and signed off on by the defendant's attorney or the defendants regarding Mr. Klacik's knowledge.

Please go ahead and answer the question.

A. My understanding is that students in the first and second year of a four-year degree program are not required to have named a major in any way. That one is not normally required until they have completed the general education requirement and move on, essentially move on into their junior year of college.

Q. Is a student generally prohibited from declaring a major enrolling in the first two years?

A. I don't know.

* * *

[30]

* * *

Q. In Paragraph C what does "educational program" mean? Can you define it?

A. I would have to defer to the institution.

Q. What does religious worship mean?

A. Again, I'd have to defer to the institution.

Q. Religious exercise?

A. Once again, I'd have to defer to the institution.

Q. And religious instruction?

A. It would be to the intuition that I would look to.

Q. Assuming the state's interest is driven by the division of church and state, and based upon your deference to the institution, how does the Board verify that a student isn't pursuing a degree in theology if the institution is doing all the decision making?

* * *

MR. SHINN: I'm going to object to the question to the form as confusing. But if you

[31]

understand, please go ahead and answer.

Q. Would you like me to break that down into parts?

A. If you wish.

Q. Does the Board train any institutional personnel on how to determine that a person is pursuing a degree in theology?

A. No, it does not.

Q. Do you do any kind of site checks or verification to ensure that the institution is following your criteria?

A. In the Promise Scholarship that's not happened.

Q. Do you review the institution's process for making the determination?

A. Not -- no.

Q. Do you have plans to initiate a review of institutional determinations?

A. I have no plans.

Q. Referring back to the document again, who completes and signs off on this document?

A. This is a document which the financial aid administrator signs off on at the time that they are submitting their request for warrants or for money.

Q. The educational institution?

[54]

Q. As far as the institution goes, what are the criteria for being an eligible institution?

A. Must be offering their education within the State of Washington, and must be accredited -- must be accredited by an accrediting agency that's recognized by the Board.

Q. Those are national?

A. Yes.

Q. And was Northwestern qualified under those criteria?

A. Northwest College?

Q. Northwest College, excuse me.

A. Yes.

Q. And is it currently eligible?

A. Yes.

Q. I'm bouncing around. So no student is pursuing a degree in theology is a requirement that you send to the school, correct?

A. Yes, the certification statement.

Q. And the school makes the decision as to whether a person is pursuing a degree in theology?

A. Yes.

* * *

[61]

* * *

A. They could do that.

Q. Or software related to the course?

A. Um-hmm.

Q. That's a yes?

A. Yes.

* * *

Q. Did you receive a budget from Northwest College specifying these categories for 1999?

A. I'm sure we did.

MR. MCCALEB: Mike, I'll probably send a supplemental request and get that from you guys.

Q. So you've delegated the responsibility for determining what an educational expense is to the institutions?

A. Yes.

Q. Have you ever had a case where a budget has come back to you from an institution with a category or an item defined within the educational expenses that you said: No, this isn't legitimate, and rejected the budget?

A. Yes.

[66]

* * *

Q. When are you going to get the finished official hard copy prints out?

A. Oh, they are being sent out right now.

Q. On the first page, this is a four-page document, and it is not Bates numbered. The first page there is a sentence that says, "Who is eligible?"

Statement No. 4 says, "Not pursue a degree in theology," and there is a reference there. What's that reference?

A. The reference is to RCW 28B.10.814.

Q. And that's a Washington statute, correct?

A. Yes.

Q. What's that statute say?

A. I don't have it in front of me but it concerns theology. It's the theology statement.

Q. It's a theology statement that pertains to not pursuing a degree in theology?

A. Right.

Q. There is another Washington statute that's closely allied to that which is Section 28B.10.812,

also pertains to matters of religion. Are you familiar with Section 812?

A. Not off the top of my head, no.

[67]

Q. It reads: All student financial aid shall be granted by the commission without regard to the applicant's race, creed, color, religion, sex or ancestry. Are you familiar with that now that I have read it?

A. Yes.

Q. Why is there no reference to that in this application?

MR. SHINN: Objection. It calls for a legal conclusion.

Go ahead and answer if you know.

A. I think that what we have addressed here are the points that we have understood to be the most important and germane for the student and the families to understand as they apply for the scholarship.

Q. The general nondiscrimination statement is not important?

MR. SHINN: Well, I'll object. It misstates testimony.

But go ahead and answer.

A. Again, I think this is addressing the most important issues that we felt that students and the families wanted to know about and needed to know about.

[74]

* * *

My question is what nonstate resources are contemplated in that paragraph?

A. I don't know of any.

Q. Do you ever receive any contributions from private sources for your program?

A. There is the American Indian Endowment Scholarship Program, we receive contributions for that.

Q. What's the source of funds for paying the Promise Scholarship grants?

A. It is the State General Fund.

Q. Is there any federal funding involved?

A. No, there is no federal monies.

Q. Do you receive federal money for Board administrative purposes?

A. For?

Q. Just for operating the Board.

A. None that I know of.

Q. These became effective I believe on October 4, if I read that date stamp correctly. It's poor on my copy. Are these currently in effect?

A. The Board has adopted permanent rules now.

Exhibit 6

TO: Financial Aid Administrators

FROM: John Klacik

SUBJECT: WASHINGTON PROMISE SCHOLARSHIP: DEGREES IN THEOLOGY

Over the past few days, you have received differing messages from me regarding institutional certification of student eligibility for the Washington Promise Scholarship. The first certification included a statement, borrowed from the Educational Opportunity Grant program statute, that Washington Promise Scholarships recipients would not be engaged in various aspects of religious instruction. On Friday, based on staff review of the legislation establishing the Promise Scholarship program and on feedback from some institutions that time did not allow for such a comprehensive certification, we modified the statement, removing that reference.

Based on further review and consultation with the Attorney General's Office, however, I am writing to clarify that students who are pursuing a degree in theology are not eligible to receive *any* state-funded student financial aid, including the new Washington Promise Scholarship. Although the Appropriations Bill creating this program is silent on this issue, the State Constitution is clear regarding the separation of church and state. We have consistently interpreted this constitutional provision as

prohibiting state financial aid funds for students who are pursuing a degree in theology. That prohibition must also be applied to this new program.

A statement certifying that Washington Promise Scholarship recipients are not pursuing a degree in theology will be added to the Payment Request Form.

We apologize for the confusion, and hope that this clarification will be helpful. Please contact me if you have any questions. I can be reached by telephone at [redacted], or by email at [redacted].

Thank you.

[2]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

[Caption Omitted In Printing]

EXCERPTS OF DEPOSITION OF REBECCA COLLINS
Monday, May 1, 2000

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[16]

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Q. [BY MR. MCCALEB] Okay. Were you aware of the criterion that in addition to the financial, organizational and academic criteria we have already discussed there is a criterion saying before you get the money you can not be pursuing a degree in theology?

A. Yes, I was aware of that.

* * *

Q. What does pursuing a degree in theology mean to you?

A. Well, I don't – I'm not certain.

Q. Who would be certain?

A. The individual institutions determine – each one determines what they determine to be a degree in theology.

Q. So the decision as to who is or is not pursuing a degree in theology rests with the institution?

A. Yes.

* * *

[2]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

[Caption Omitted In Printing]

EXCERPTS OF DEPOSITION OF LINDA SCHACTLER
Monday, May 1, 2000

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[16]

* * *

Q. [BY MR. MCCALEB] What does pursuing a degree in theology mean?

A. I don't know.

Q. Who does know?

A. That is a determination that is made on college campuses.

Q. By whom?

A. I don't know.

Q. By the institution, though, rather than a government official?

A. I wouldn't want to guess about exactly who makes that decision. I know that that's not a decision that the HEC Board makes.

* * *

[2]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

[Caption Omitted In Printing]

EXCERPTS OF DEPOSITION OF LANA J. WALTER
Friday, June 16, 2000

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[10]

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Q. Were there any criteria attached to the type of school?

MR. SHINN: I'm going to object; vague as to the time frame. Go ahead and answer.

MR. McCALEB: I think the time frame is the spring of 1999, as I understand it, when you first learned of the program.

THE WITNESS: Yes.

MR. McCALEB: And the question before you now is whether there is any organizational criteria. You said attending, I believe, a four-year institution?

A. Actually, I don't know if it was a four-year institution or a school, a college, in the State of Washington. It was my understanding this college or institution had to have certain accreditation standards. And I don't actually know if two-year schools are eligible for the Promise Scholarship.

Q. Since that time when you first heard of this program, have those criteria changed?

A. Since I first learned of the criteria for the Promise Scholarship, I learned in October of 1999 that

[11]

students majoring in Theology were not eligible for the Promise Scholarship.

Q. And how did you learn that?

A. Through a letter from John Klacik.

Q. What did Mr. Klacik say in that letter?

A. He said that students majoring in Theology were not eligible to receive the Promise Scholarship.

Q. Did he state any authority for that restriction?

A. In the letter he states -- I don't know exactly what he uses to say that students are not eligible, if he quotes a rule, the WAC, Washington --

Q. Administrative Code?

A. Correct. If he states that or not.

Q. Did you have any other communication from Mr. Klacik besides the letter you reference regarding these change criteria?

A. Phone call.

Q. When was that?

A. The day would probably be one or two days after the 12th of October, when I received the letter. I did call John Klacik.

Q. And what did Mr. Klacik say to you?

A. We discussed the letter. And I asked John Klacik why this new criteria had been put in place. And I explained to him the difficulty I was in with four

[12]

of my students.

Q. Who were those students?

A. Joshua Davey; Luke Glidden, G-L-I-D-D-E-N; and there are two others, and I don't remember their names.

Q. Male, female?

A. Two females.

Q. Do you remember first names, last names of either of them?

A. One, the last name was Hamer, H-A-M-E-R. And the other one was Robinson. I just remembered it.

Q. What was the nature of the trouble regarding these four students?

A. The students had been informed by the State through a letter from Governor Locke that they were recipients of the Promise Scholarship. I believe the letter they received was in September. The students were under the impression that they were receiving the scholarship. And it was left to the college, meaning to inform the students that they were not eligible for the scholarship due to the nature of their major.

Q. How did that obligation come to rest on your shoulders to inform them they were no longer eligible?

A. As the Director of Financial aid, it would fall upon my shoulders.

Q. But this was a State requirement, that people

[13]

pursuing a Theology degree were not allowed to have the scholarship after the State requirement went into effect?

A. Correct.

Q. What benefits were attached to receiving the Promise Scholarship?

A. The Promise Scholarship could be applied for any educational expenses the student had at a college.

Q. So there's a monetary disbursement, an award of money?

A. Correct.

Q. Is it generally considered an honor to receive a scholarship?

A. Yes.

Q. Would there be any distinction between scholarships received strictly on the basis of economic need and one that has academic criteria, in terms of one having more of a sense of honor?

A. Yes.

Q. What would that distinction be?

A. A scholarship received for academic ability or talent is perceived more prestigious than a scholarship received based upon need.

Q. Who would be perceiving that as prestigious, employers, other schools?

A. The family, the student, grandma, grandpa, other

[14]

students, faculty, future employers, current employers.

Q. Did Northwest College extend any particular recognition to those people who received or were eligible for the Washington Promise Scholarship?

A. No.

Q. Are you aware of any other organization that gave formal recognition to Washington Promise Scholarship recipients?

A. No.

Q. You said that the Governor had sent out a letter, and we have previously entered into evidence a letter from the Governor, and a certificate.

Are you aware of anything the State did besides those two items to recognize Promise Scholarship recipients?

MR. SHINN: I'm going to object as to the characterization of the evidence and whether this witness is aware of what that evidence is or not.

MR. McCALEB: I'll rephrase.

You mentioned earlier that the students that have come to you, the four students that received the letter from the State that had indicated they were eligible for the Washington Promise Scholarship, are you aware of any other materials, correspondence, or attention that any of those four students received from the State?

[15]

A. No.

Q. Did you or Northwest College issue any news releases?

A. No.

Q. Was receiving the Washington Promise Scholarship itself considered an honor?

MR. SHINN: Objection, calls for speculation; vague. Go ahead and answer.

A. Yes.

MR. McCALEB: It's a little unnerving to have people do that, object when you're about to speak. Get used to it. That's really one of the most painful things about depositions, I think.

Q. How many Northwest College students were determined to be eligible to receive the Promise Scholarship in the 1999-2000 academic year?

A. I have the information in this folder. But I could guess.

Q. If you want to refer to notes, that's fine.

A. Okay. I have the list. Fifteen.

Q. And these were persons who were eligible or persons who actually received the Promise Scholarship?

A. Students who received it.

* * *

[23]

Northwest College or their Promise Scholarship application. We printed that list; we had a list of students who had indicated Northwest College. And we checked that list to see if the students were enrolled at our school.

Q. You mentioned you got the information that the student intended to attend Northwest College from their scholarship application. Did you actually receive copies of that application?

A. No.

Q. How did you have access to that?

A. The applications went from the student to the State. The State selected the qualified students, prepared a master list that colleges could access from a website.

Q. So when you made that reference, you were really talking about the website?

A. Correct.

Q. Understanding that you've corrected the chronological flow of this, I'm going to follow this sequentially just so I don't mess myself up.

The fourth bulleted point is: "College eliminates students that major in Religious Studies."

What does it mean to eliminate a student that

[24]

majors in Religious Studies?

A. At Northwest College, our Department of Religious Studies, the students in that department are majoring in Theology. With the

list of qualified students, we determined which students on the list were majoring in our Religious Studies, and did not award them -- did not request a warrant from the State.

Q. You mention a Religious Studies Department. Is that an organizational division of your college?

A. Yes, it is.

Q. What other departments -- assuming these would be academic departments, what other departments are at Northwestern?

A. In addition to the Religious Studies, we have a Department of Education, Department of Nursing, a Department of Arts and Sciences.

Q. So is it accurate to say in the context of this bulleted statement that Religious Studies means any person who declared a major that was offered through the Religious Studies Department? I'm not sure I got the name of the department right.

A. It's the Department -- I have to think for a moment; we've just changed it. In 1999-2000 it was the Department of Religious and Ministerial Studies.

[26]

* * *

Q. Is Religion and Philosophy a single major, or is that two different majors?

A. One major.

Q. Would a person who is majoring in Religious Studies at Northwest College obtain a degree in Theology upon graduation?

A. The terminology would be a degree in Religious and Ministerial Studies.

Q. That's the term that appears on the graduation certificate?

A. Correct.

Q. Would a person who majors in Music Ministries be pursuing a degree in Theology?

A. Yes.

Q. And that is based upon what criteria?

A. The Department of Religion states the purpose of that department is to prepare students for ministry.

* * *

[29]

* * *

Q. I think I might have confused you. Let me rephrase.

One of the courses that a candidate would typically take, a Religious Studies major student, what courses would that person typically take during the first two years of their college career?

A. I have to admit, I am not able to list a number of courses by name. I can name a few. Students would take Biblical History, Doctrine. I could look in the catalog that's sitting there.

Q. Do the students also take during the first two years courses that are, perhaps, English, Mathematics, other what are commonly called core courses?

A. Yes, they would.

Q. And what department teaches those courses?

A. There are a number of requirements and electives that would be in different parts of the college, not just in the Religious and Ministerial Studies Department. For example, they would have to take English through Arts and Sciences; Math through Arts and Sciences. That type of situation.

Q. So a person who, for example, majored in English

[30]

that is taught through Arts and Sciences, and that was their declared major, would not be disqualified from the Washington Promise Scholarship if they were otherwise eligible?

A. Correct.

Q. Do you offer a degree in Psychology?

A. Yes.

Q. What department teaches that?

A. That is under the Arts and Sciences.

Q. Is a Psychology major required to take any courses with religious content by Northwest?

A. Yes.

Q. And what would those courses be?

A. I would have to refer to the catalog.

Q. Do you have that with you?

A. You do.

MR. McCALEB: Oh, it's there on the table. Is there any objection with her looking at

this, a Northwest 1999-2000 catalog, to refresh her memory? If there is, I don't mind dealing with this otherwise.

MR. SHINN: I guess my only objection would be that you'd have a situation where there's really, apparently, lack of personal knowledge. I don't object to having the witness look at it to see if it refreshes her recollection, though.

[31]

MR. McCALEB: Let's do that momentarily. I don't want you to read that exhaustively. But if you can glance at it.

THE WITNESS: Could you just restate the question.

MR. McCALEB: The question was: What courses of a religious nature or content a Psychology major would typically take. And again, the purpose of this is to refresh your memory. I don't want you to just read the book.

A. A Psychology major may take the History of The Bible, Evangelism, Church Doctrine type of classes.

Q. Is that a may take or a must take? Is there a school requirement that they take them?

A. It would be considered -- they are required to take a number of credits. And that could be part of what they took.

Q. Do you know if they are required to take any course as to religious content?

A. Yes.

Q. Do you recall which course that required course would be, or courses?

A. A number of courses would be offered. And they would choose.

Q. Cafeteria plan?

[32]

A. Correct.

Q. But they all have religious content?

A. Correct.

Q. Is this a common core for all majors at Northwest?

A. Yes.

(A brief recess was taken.)

MR. McCALEB: Lana, I'm going to interrupt the sequence of this document and introduce another document that we can discuss. This document was previously introduced into the record in Mr. Klacik's deposition as Exhibit 6.

Q. Do you recognize this document?

A. Yes, I do.

Q. And what is it?

A. It's a letter from John Klacik introducing, informing, colleges that students could not be majoring in Theology.

Q. Have you seen this document previously?

A. Yes, I have.

Q. When was that?

A. I have a copy of this letter that my college received.

* * *

[38]

* * *

Q. So more students actually declare a major in the first two years?

A. At my college, yes.

Q. Can you define that with a number or estimate percentage?

A. I can only guesstimate.

Q. Give me a guesstimate.

A. When students come in, I would say 15 percent come in undeclared at my college.

Q. Does Northwest have a rule that you must declare when you enroll at Northwest?

A. They do not.

Q. And rather obviously, does Northwest ever rule that you cannot declare a major the first two years?

A. They do not.

* * *

[51]

Q. Does it appear to be an accurate copy of the disbursement information sheet?

A. Yes.

Q. Was this guidance within this information sheet valid for the 1999-2000 school year?

MR. SHINN: I'm going to object to lack of personal knowledge. You can go ahead and answer.

A. Yes.

Q. If you'd look at the third to the last paragraph. The second to the last sentence reads: "If you choose, you may use the warrant to pay for tuition or other educational expenses, but the school may not automatically deduct anything from the warrant." What do you understand "educational expenses" to mean?

A. Educational expenses to me would mean tuition, a room and board, books, supplies.

Q. What about the purchase of a computer for schoolwork purposes?

A. I would determine that to be an educational expense.

Q. How about computer software that's relevant to a course?

A. I would call that educational ex[illegible]

Q. Would that include a Bible Studies software

[52]

program for, say, a Bible literature course?

A. Yes.

Q. What about a Bible study software program for a pastoral ministers' course?

A. Yes.

Q. Would that include the purchase of reference books -- not textbooks -- but reference books relevant to a course from a campus bookstore?

A. Yes.

Q. Would it include purchasing course reference books from an off-campus store?

A. Yes.

Q. Does it matter if educational items are purchased on campus or off campus?

A. No.

Q. Does it include groceries?

A. Yes.

Q. Tutoring?

A. Yes.

Q. Course-related field trips?

A. Yes.

Q. Internet access for research purposes?

A. Yes.

Q. Does the school provide internet access?

A. Yes.

[57]

* * *

Q. At the time of the appointment which you characterized as a few days after the 12th of October, was Mr. Davey at that time eligible for the scholarship?

A. Not according to the new criteria.

Q. Was he eligible prior to the issuance of the new criteria?

MR. SHINN: I'm going to object to that; lack of personal knowledge.

A. He was on the list of eligible students.

Q. And that list was the official State website?

A. Correct.

Q. Who has access to that website?

A. There may be more people than I know. But financial aid administrators, you get a password; you have to apply for it. You get a password and you're eligible to access the website.

Q. At Northwest College, is anyone beside yourself authorized to access that site?

A. Brian Renney.

Q. I will characterize your first appointment with Mr. Davey, the one a few days after October 12th, as the mid-October appointment. Is that sufficiently accurate, or were there a series of appointments?

A. I believe there was one appointment.

[58]

Q. I will call it the mid-October appointment, then.

At that mid-October appointment, is it correct to say Mr. Davey had become ineligible for the Promise Scholarship because of the religious restriction on the award of funds?

A. Correct.

Q. If he had changed his major at that time to, for example, Business Administration, and solely Business Administration, would that have affected his eligibility for the scholarship?

A. Yes, with a caveat.

Q. What's the caveat?

A. I will share with you how I talk to students in this situation.

Q. Okay.

A. Being a Christian school, and working with the State, this issue, as you can imagine, comes up. And with the student who is perhaps struggling with being eligible for State money and their major, I talk with them, If you plan to become a minister or to change your major to Religious Studies and you know that, and you know you want to be a minister or you know you want to go into the ministry, you should not accept this award no matter what your major.

[59]

Q. Why do you say that?

A. I believe that it is the spirit of the law that I've interpreted in the State of Washington, that separates the church and State. That is what they have meant, the founders of our Constitution.

Q. When you say "our Constitution," are you speaking of the federal government constitution or the State Constitution?

A. The State.

Q. If at the time of the mid-October appointment Mr. Davey had not declared a major, would he have been eligible for the Washington Promise Scholarship under the criteria existing then, which included the religious restriction?

A. I don't understand the question.

MR. McCALEB: It was a long, involved one. At the mid-October conference, or appointment, if Mr. Davey had not already declared a pastoral ministries major, would he have been eligible for the Washington Promise Scholarship?

A. Yes, with a caveat.

Q. What would that caveat be?

A. The one I explained. I sit with a student and talk to them, and I let them decide; I give them the choice. I say to the student, If you are planning to

[60]

become a minister, no matter what your major is, this warrant, this check, this award, is not intended to go to a student in your position. And I talk with the student, By just changing your major to get this award is not the correct thing to do.

Q. Let me first clarify my prior question. I think I unwittingly made it too narrow, in that I specified pastoral ministries major. What I really should have said was the Religious and Ministerial Department majors.

In other words, had Mr. Davey declared a major other than one within the Religious and Ministerial Department, would he have been eligible under the State criteria for the award?

A. Yes.

Q. But as I understand what you're telling me, there's also sort of a faith-based criteria that you feel that you need to discuss with the students.

Is that what you're telling me?

A. Correct. On a basis of -- in a situation like this, yes.

Q. So you have a State criteria which states you cannot receive the Promise Scholarship if you're pursuing a degree in Theology.

What motivates you to convey to the students not just the text of the law, but the spirit of the law?

[61]

A. I believe it's important for students to -- let me start over.

Being in Financial Aid for over ten years in this state, I feel it's important to manage or administer the State money as closely as I can to the written law and the spirit of the law. And with my experience in the State with working with folks from the Higher Education Coordinating Board and with other financial aid administrators from secular schools and sectarian schools, that this is the way I've defined it to students who, perhaps, may want to play the system, I feel that a student -- if an award is given by the State and it's not intended for

students majoring in Theology, and not studying for the ministry, I feel that our students should not try to have the money and then switch to a different major.

Q. Who told you to convey this spirit of the law to the students in that fashion?

A. No one has told me that. I do check with students who are receiving State funding; we do check the classes they're taking. And if the student will be taking strictly all classes that would lead to a degree in Religious and Ministerial Studies, I would talk with the student. I think to me it's an ethical --

Q. So this written State requirement that you

[62]

cannot pursue a degree in Theology, in your situation is requiring a more, I guess you could say, conservative approach because of the ethical implications; is that correct?

A. Correct.

* * *

Q. Within this context of ethical counseling, is there a faith-based component to that?

A. On my part?

Q. Yes.

A. Yes.

Q. Could you briefly describe that.

A. When I counsel students, I talk to them, as I explained previously, about their intention. And I talk with them. And if they say to me, I don't

know; I don't know if I want to be a minister, I don't know if I want to be a businessman, I have faith in the student that they will be truthful with me in what they're doing in determining their major.

Q. If you had, for example, a student who was a declared Psychology major and you were having your financial aid counseling session with them, and this student expressed a firm religious conviction that he was

[63]

studying Psychology to become a minister and he felt this source of study would help him become most effective Christian minister he could be, would you feel a moral or faith-based obligation to discuss with him or urge him not to accept State financial aid because of his intent to become a minister under the spirit of the state law as you perceive it?

A. I would talk with him and I would explain to him my understanding of the State Financial Aid programs and what students they want to see receive the money. And I would talk to him about it and see what decision he would make.

Q. Would you encourage him either way?

A. I would state the facts. And I would say, It is up to you.

* * *

[66]

* * *

A. It's my understanding that we would have several weeks notice.

Q. Have you received any notice that you will be audited in this regard?

A. No.

Q. Do you know who would conduct that audit if one was to be conducted? Is it through the HECB?

A. It would be through the HECB. I would not know of a particular person or office that would do that.

Q. We've discussed the Condition of Award form that the student signs.

Is there also a form that the school provides to the State to verify that the student is not pursuing a degree in Theology?

A. There is a statement that we send. We send the list of students we request a warrant for -- like I mentioned, an e-mail with an Excel attachment -- and we follow up with a certification that the students are eligible according to the guidelines. And we send that via mail and sign it, that these students are eligible for the program according to the State's regulations.

* * *

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* * *

Q. You mentioned earlier in the conversation that there were two female students who changed their major in 1999, Hamer and Robinson.

Realizing memories are funny and you get things back over time, do you happen to recall if they declared majors in the fall of 1999?

A. They declared undeclared.

Q. At your mid-October appointment when you had the discussion with him and he had already declared a pastoral ministries major, he had learned he was ineligible for the State funding because of that, could he have retracted or rescinded that declaration and become an undeclared major at that point?

A. He could have, yes.

Q. Would that have made him eligible for the Promise Scholarship under the State criteria?

A. Yes.

* * *

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* * *

MR. McCALEB: * * *. It is within the normal scope of your professional duties to counsel students in this way?

A. Yes.

* * *

EXAMINATION

BY MR. SHINN:

* * *

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* * *

Q. Aside from the HECB Board, have you sought guidance from any other State officials regarding what it means?

A. Besides the HECB Board?

Q. Yes.

A. I have talked to colleagues that are at private schools, sectarian schools. I have sought guidance from other professionals.

Q. Have those contacts all been with colleagues at private institutions?

A. Yes.

Q. I don't want you to divulge any advice that you may have received from an attorney that was advising the college. But without telling me what that advice is, have you ever sought legal advice on what a degree in Theology is?

MR. McCALEB: Objection to the extent that any attorney-client privileged information is involved.

A. No.

Q. You spoke earlier in your deposition about the

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Condition of Award letter. Am I correct in understanding that you asked students to sign a Condition of Award letter as a precept to receiving the Promise Scholarship?

A. Correct.

Q. Has anybody from the Higher Education Coordinating Board indicated to you that

students must sign a Condition of Award letter to qualify for the Promise Scholarship?

A. They have to sign it to receive it.

Q. And my question to you is: Has anybody at the HECB Board indicated that the students have to sign a Condition of Award letter to receive the Promise Scholarship?

A. Yes.

Q. Who has indicated to you that students had to sign a Condition of Award to get the Promise Scholarship?

A. It's my understanding from John Klacik, and the correspondence from the HECB, that a student is required to sign that certification at the time they're presented with the award.

Q. Is it your testimony that you've had conversations with Mr. Klacik in which he has indicated verbally that students need to sign a Condition of Award letter to qualify for the Promise Scholarship?

A. I believe my understanding of the certification

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would be from his correspondence, not in a phone call or a personal discussion.

Q. Is it correct to say that it's your belief that the documentation, either through e-mail or letter or memorandum from Mr. Klacik, has indicated that students need to sign a Condition of Award letter to be awarded the Promise Scholarship?

MR. McCALEB: I object to that characterization. You may answer.

A. Yes.

Q. So you recall that you've received either a letter or e-mail from Mr. Klacik indicating the students needed to sign a Condition of Award letter?

A. Yes.

Q. Do you recall which communication had that requirement in it?

A. I do not recall which communication. I probably could access something that had it in it, but I don't recall specifically which correspondence.

Q. Do you think that it might be among the documents that you brought with you today?

A. I could look.

Q. If you would take a look, I'd appreciate it.

A. (The Witness complied.) This is a correspondence that included the addition to pursuing a degree voucher to

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the payment request form, but not to the actual students signing it (indicating).

* * *

MR. SHINN: Let me just ask, if you would, to restate what that document entails, if there's no objection.

THE WITNESS: This document I have from John Klacik indicates the addition of the stipulation that a student not be pursuing a

degree in Theology that was added as a condition that the school signed, on the certification that the school sends to the State via mail, to follow the Excel spreadsheet that would request the warrant.

That is what this document is. I don't have in my notes here a document saying the student has to sign a certification.

Q. And let's make sure -- I think the document you're referring to has previously been identified as Exhibit 6 to John Klacik's deposition.

We want to just make sure that you're looking at the same document.

A. Correct. It states here: "A statement certifying that Washington Promise Scholarship recipients

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are not pursuing a degree in Theology will be added to the payment request form." And that is the form that the school signs. And it's not for a particular student.

I don't have in my notes here the correspondence from them indicating that a student must sign a particular statement. But with the other State programs, a student must sign. When a student is in the Washington State Work Study program or the State Need Grant program, they must sign a statement that's called Terms and Conditions of Award. And they certify on those, I am not pursuing a degree in Theology.

And we have added that to the Promise Scholarship recipients as well. At this time, I'm

not sure if we added it, or John Klacik or the State requested we do it.

Q. So it's accurate to say that at this time you believe it's possible that the requirement that students sign a Condition of Award letter is actually something that Northwest College implemented on its own volition?

A. I'm not sure; it could be.

Q. It could be. But it's possible you believe that Mr. Klacik did indicate that a Condition of Award letter was necessary for the Promise Scholarship?

A. Correct.

* * *

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* * *

Q. You testified earlier that you understand that the spirit of the law is that State financial aid funds do not go to a student who is preparing for service in the ministry; is that right?

A. Correct.

Q. In the fall of 1999, was a warrant distributed from the HECB Board to Northwest College for the plaintiff, Joshua Davey, for the Promise Scholarship?

A. No.

* * *

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* * *

Q. Referring to what's been marked as Exhibit No. 3. This is a copy of the Northwest College Mission as is available on the Northwest College website.

Are you familiar with the Northwest College Mission statement?

A. Yes.

Q. Does this appear to be an accurate copy of that statement as is posted on the college's website?

A. Yes.

Q. Referring you to the paragraph under Educational Philosophy, the first paragraph about midway down the page, it states that: "Northwest College's concept of education is distinctly Christian in the evangelical sense." And goes on to state: "It recognizes the authority of the Bible as the divine communication of

[100]

truth."

Can you tell me what it means to recognize the authority of the Bible as the divine communication of the truth, as you understand it?

* * *

A. As I understand it, that the Bible is the -- well, it is the Word of God. And it is where Christians go to seek answers to -- where Christians go for counsel, advice, for how Jesus wants us to live our life.

Q. Can you tell me, does that accurately reflect the college mission as you understand it?

MR. McCALEB: Object to personal knowledge. Go ahead and answer.

A. My understanding of our mission is to provide our students, through instruction, through modeling, through our classes, to use the Bible as truth to prepare them, that when they are in their careers, wherever they choose, wherever they go, that they would use the Bible as their guide, as the truth. And to prepare the students, as we say, "for service and leadership."

* * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOSHUA DAVEY,

Plaintiff,

vs.

GOVERNOR GARY LOCKE, et al.,

Defendants.

JUDGMENT

Cause No. C00-61R

This matter having come before the court and the issues having been decided, IT IS NOW, THEREFORE, ORDERED that Davey'S [sic] motion for summary judgment is DENIED and HECB's motion for summary judgment is GRANTED. As a matter of law, HECB is entitled to complete dismissal of Davey's complaint.

6 October 2000

BRUCE RIFKIN
Clerk of Court
By
//s//
Elizabeth Tyree
Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOSHUA DAVEY,

Plaintiff,

v.

GOVERNOR GARY LOCKE, individually and in his official capacity, et al.,

Defendants.

No. C00-61R

ORDER DENYING PLAINTIFF'S MOTION FOR TEMPORARY INJUNCTION

I. BACKGROUND

THIS MATTER comes before the court on plaintiff Joshua Davey's motion for a temporary injunction during the pendency of his appeal to the Ninth Circuit from this court's October 5, 2000 order denying his and granting defendants' motions for summary judgment. Davey now seeks an order from this court pursuant to Federal Rule of Civil Procedure (hereinafter "Rule") 62(c) directing Governor Locke and the State Higher Education Coordinating Board to put $1542, representing financial aid funds he claims entitlement to, into an escrow account until his appeal is resolved.

Davey initially brought suit against Governor Locke, Marcus Gaspard, Executive Director of the Higher Education Coordinating Board, Bob Craves, Chair of the Higher Education Coordinating Board, and John Klacik, Associate Director of the Higher Education Coordinating Board (hereinafter

collectively referred to as "HECB" unless individually identified) claiming that HECB's denial of financial aid in support of his religious education violated his state and federal constitutional rights. This court disagreed, finding that the state was precluded from supporting his religious instruction in its constitution, and that its decision was within the limits imposed by the First Amendment to the United States Constitution. Davey appealed from that decision to the Ninth Circuit Court of Appeals. Davey now claims that, should he prevail on appeal, his right to receive financial aid will be impaired by operation of the Eleventh Amendment's sovereign immunity bar against retrospective damages.

II. DISCUSSION

Rule 62(c) provides the court with the discretion to grant an injunction during the pendency of Davey's appeal from its order denying his claims. Fed. R. Civ. P. 62(c). In exercising this discretion, the court considers 1) whether the moving party has made a strong showing of his likelihood of success on the merits of his appeal; 2) whether he has demonstrated irreparable injury should an injunction not issue; 3) whether the potentially enjoined party would suffer substantial injury from the injunction; and 4) whether the proposed injunction is in the public interest. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Similar to the standard for preliminary injunction, "the movant need not always show a 'probability' of success on the merits; instead, the movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of the

equities weighs heavily in" the moving party's favor. *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981).

Davey presumes a strong likelihood of success on the merits of his appeal. He fails to acknowledge that this court has twice disagreed fundamentally with his construction of the law and denied the very relief he now seeks. Each appellate issue Davey relies on to demonstrate a substantial case on the merits is wholly contrary to well-established federal law, and he fails to address the long line of Washington state decisions that dispose of many of his claims. The court therefore finds that Davey has an exceptionally weak chance of succeeding on the merits of his appeal.

That notwithstanding, Davey has raised the possibility of irreparable injury in that the Eleventh Amendment may protect Washington from a damage award should the Ninth Circuit reverse this court, while prospective relief in the form he now requests is not likewise barred. HECB has not disputed his construction of law with respect to this state immunity doctrine. In response, HECB has offered to set aside the $1542 Davey seeks in its operating budget to preserve the funds in the event of reversal.

The court finds that offer to set aside funds in HECB's operating budget sufficient to protect Davey's interest during the appeal process. HECB has made a sworn representation to the court that it will preserve the funds Davey seeks, and will pay those funds to him in the event this court's decision is overturned. That reliable representation virtually obviates the risk of irreparable harm and, combined

with the weakness of the merits of Davey's case, dictates that Davey's motion be denied.[1]

III. CONCLUSION

For the reasons expressed above, the court, in its discretion, hereby DENIES Davey's motion for a temporary injunction. The court accepts HECB's offer to set aside $1542 during the pendency of Davey's appeal, which shall be paid to Davey upon court order in the event that he prevails on appeal.

DATED at Seattle, Washington this 21st day of November, 2000.

//s//
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

[1] In light of HECB's proposed arrangement, the court need not discuss the additional elements under *Braunskill*, except to state that it finds no public interest implicated by the instant motion.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

PLAINTIFF'S NOTICE OF FILING AGREEMENT REGARDING ESCROW OF FUNDS

[Caption Omitted In Printing]

PLEASE TAKE NOTICE that plaintiff Joshua Davey, through counsel, submits the attached Agreement Regarding Escrow of Funds for filing with this court. This agreement was entered into pursuant to this Court's November 21, 2000 Order and is being submitted accordingly.

[top of page]

JOSHUA DAVEY V. GARY LOCKE, ET AL.

AGREEMENT REGARDING ESCROW OF FUNDS

The parties to this agreement are the plaintiff in *Joshua Davey v. Gary Locke, et al.*, Western District of Washington Federal District Court Cause No. C00-0061R, and the defendants in that action, Gov. Gary Locke, Bob Craves, Marcus Gaspard, and John Klacik.

Whereas on November 6, 2000, the defendants agreed to hold $1,542.00 in reserve, to provide a fund from which plaintiff would be paid should plaintiff's appeal of the District Court's order dismissing his claims ultimately lead to an order that plaintiff should have been provided Promise Scholarship funds for the 2000-2001 academic year; and

Whereas the plaintiff's request that the District Court enter a temporary injunction requiring defendants to place $1,542.00 into private escrow

pending plaintiff's appeal of the dismissal of his claims was denied by the District Court by order dated November 21, 2000; and

Whereas the plaintiff intended to seek similar relief from the Ninth Circuit Court of Appeals, NOW THEREFORE:

The defendants agree to provide a reserve fund to provide for the contingency that plaintiff could prevail in the appeal of the dismissal of his claims by purchasing a six (6) month certificate of deposit in favor of Marcus Gaspard in his official capacity as Executive Director of the Washington State Higher Education Coordinating Board, and Kevin Theriot, as attorney for plaintiff Joshua Davey.

Defendants, through their attorney Michael Shinn, Assistant Attorney General, will provide proof of purchase of this certificate of deposit satisfactory to Mr. Theriot, which approval will not be unreasonably withheld. Defendants will renew or permit the certificate of deposit to be automatically renewed until one of the following occurs:

(a) If final judgment is entered dismissing plaintiff Joshua Davey's claims or otherwise rejecting his claims that he was entitled to payment of Promise Scholarship funds for the 2000-2001 academic year, from which no timely appeal is taken, Mr. Theriot will endorse the current certificate of deposit and any interest in the certificate of deposit over to the Higher Education Coordinating Board, together with interest then accrued, and return the endorsed certificate of deposit to the Higher Education Coordinating Board through its attorneys; or

(b) If final judgment is entered ordering that plaintiff Joshua Davey is or was entitled to award of Promise Scholarship funds for the academic year 2000-2001 , [sic] from which no timely appeal is taken, the Higher Education Coordinating Board, through its Executive Director, will endorse the then-current certificate of deposit in favor of Kevin Theriot as attorney for plaintiff Joshua Davey, together with interest then accrued, and provide the certificate to plaintiff through his attorney.

Plaintiff agrees, during the pendency of this agreement, not to seek judicial intervention requiring other escrowing of Promise Scholarship funds for plaintiff.

The parties agree that this agreement may be modified in writing by mutual consent of the parties at any time.

//s//	//s//
Michael J. Shinn, WSBA# 22329 Assistant Attorney General Attorney for Defendants	Kevin H. Theriot American Center For Law and Justice Attorney for Plaintiff
Dated this 12th day of January, 2001.	Dated this 4th day of January, 2001.

WASHINGTON REGULATIONS

Wash. Admin. Code 250-80-010
Purpose.

The Washington promise scholarship program recognizes and encourages the aspiration for superior academic achievement of high school students who attend and graduate from Washington high schools. The program offers a two-year scholarship for eligible students that may be used at any accredited institution within the borders of the state. The scholarship may also be used at certain Oregon institutions offering programs not offered in Washington.

Wash. Admin. Code 250-80-020
Definitions.

(1) "Board" means the higher education coordinating board.

(2) "OSPI" means the office of the superintendent of public instruction.

(3) "High school" means a secondary institution in Washington state identified by the office of the superintendent of public instruction as qualified to confer high school diplomas to a graduating senior class.

(4) "Parent(s)" mean the biological or adoptive parent of the student applicant and the spouse of a biological or adoptive parent. In cases of divorce or separation the parent for purposes of reporting income and family size is the biological or adoptive parent who provided more than one-half of the applicant's support in the previous twelve

months. The term parent does not include either foster parents or legal guardians.

(5) "Family size" is the number of people for whom the applicant's parent(s) provided more than one-half of the support in the previous twelve months.

(6) "Income," in most cases means the applicant parent's adjusted gross income (AGI) as reported on the previous calendar year's federal tax return. For the independent student, income means the student's adjusted gross income as reported on the previous calendar year's federal tax return.

(7) "Independent student" means a student whose biological parents are both deceased and there is no adoptive parent, or the student is a "ward of the court," or the student has been legally emancipated by court order. The board may also recognize a student as independent due to exceptional circumstances as recognized by the appeal committee.

(8) "Appeals committee" means a committee convened by the board to review petitions and requests by students for consideration of individual exceptional circumstances.

(9) "Median family income (MFI)" means the median income for the state of Washington, by family size, as compiled by the federal Bureau of the Census and reported annually in the *Federal Register*.

(10) "Income cutoff" means one hundred thirty-five percent of the median family income.

(11) "Academic year" means the fall, winter, and spring quarters or the fall and spring semesters between July 1st and June 30th.

(12) "Eligible student" means a person who:

(a) Graduates from a public or private high school located in the state of Washington; and

(b) Is in the top fifteen percent of his or her 2000 graduating class; or

(c) Attained a cumulative score of 1200 or better on the Scholastic Assessment Test I (SATI) on the first attempt; or

(d) Attained a cumulative score of 27 or better on the American College Test (ACT) on the first attempt; and

(e) Has a family income less than one hundred thirty-five percent of the state's median; and

(f) Enrolls at least half time in an eligible postsecondary institution in the state of Washington; and

(g) Is not pursuing a degree in theology.

(13) "Eligible postsecondary institution" means:

(a) A public institution authorized by the Washington legislature and receiving operating support through the state general fund; or

(b) A postsecondary institution, whose campus or branch campus is physically located in the state of Washington, and who is accredited by a nationally recognized accrediting body. The recognized accrediting bodies are:

(i) Northwest Association of Schools and Colleges or a similar regional accrediting body as determined by the board;

(ii) Accrediting Bureau of Health Education Schools;

(iii) Accrediting Council for Continuing Education and Training;

(iv) Accrediting Commission of Career Schools and Colleges of Technology;

(v) The Accrediting Council for Independent Colleges and Schools;

(vi) The National Accrediting Commission of Cosmetology Arts and Sciences;

(vii) Middle States Association of Colleges and Schools, Commission on Higher Education;

(viii) New England Association of Schools and Colleges;

(ix) North Central Association of Colleges and Schools;

(x) Southern Association of Colleges and Schools;

(xi) Western Association of Schools and Colleges; or

(c) An accredited Oregon postsecondary institution that offers a program not offered in Washington and is located in either Columbia, Gilliam, Hood River, Multnomah, Clatsop, Clackamas, Morrow, Sherman, Umatilla, Union, Wallowa, Wasco or Washington county. The

institution must be accredited by one of the accrediting bodies listed above; and

(d) Agrees to administer the program in accordance with the applicable rules and program guidelines.

(14) "Authorized use period" means the period of time the eligible student has to complete using his or her scholarship.

Wash. Admin. Code 250-80-030
Application procedure.

(1) The eligible student will make application directly to the board.

(2) The completed application will include a data sheet, signed certification statement, a copy of the parent's previous calendar year's federal tax return for the purpose of verifying the income, and any other documentation requested by the board in response to missing, incomplete, or unclear information. Student income information will be accepted, in lieu of parental information, when the board recognizes the applicant as being an independent student.

(3) The board will treat all applications in a confidential manner.

(4) Applications will be made available through several means including:

(a) Mailings to public and private high school principals in the state;

(b) Posting on the HECB website (HTTP://WWW.HECB.WA.GOV/);

(c) Direct mailing to students.

(5) The board will annually set a deadline for the receipt of applications from that year's eligible graduating high school seniors and the deadline for renewal applications from eligible students having graduated in prior years.

(6) Applications must be received by the deadline for each graduating class of high school seniors to be considered for payment at any time during the authorized use period.

Wash. Admin. Code 250-80-040
Recipient selection.

(1) Recipients include all eligible students who have completed applications prior to the annual deadline, who are verified as having finished in the top ten percent of their senior graduating high school class, and who enroll in an eligible school.

(2) The student who is determined eligible for the first year of scholarship benefits is also presumed eligible for the second year's benefits. The student will not need to provide income information after once establishing his or her eligibility.

(3) Students not meeting the eligibly requirements for the first year of scholarship benefits may reapply for the second year of benefits.

(4) Eligibility determinations made by the appeals committee are final.

Wash. Admin. Code 250-80-050
Authorized award amounts.

(1) The maximum annual authorized award shall not exceed the representative average annual tuition and fees for resident students attending the state's

community and technical colleges, as determined by the board.

(2) The actual authorized annual award for each recipient shall be the annual appropriation, as determined by the board to be available for grants, evenly prorated among the eligible students.

Wash. Admin. Code 250-80-060
Grant disbursement.

(1) Eligible students must enroll on at least a half-time status in order to receive a scholarship disbursement.

(2) Grants to students will be disbursed in equal payments, once per term, across the three quarter or two semester academic year.

(3) State of Washington public colleges and universities may request payment for funds up to the limit of the per term award for each enrolled eligible student. The state public college or university may apply the proceeds of the scholarship to any outstanding debt owed by the student to the institution. The institution must disburse any remainder directly to the eligible student.

(4) Nonstate institutions may request that checks be written to eligible students attending their schools. The board will write individual warrants payable to each eligible student and delivered to the school for disbursement.

(5) The independent university and the private vocational school must disburse the warrant once the student's half-time or greater enrollment has been verified. The school may not withhold or delay disbursement for any reason other than for less than

half-time enrollment. The school has thirty days to either disburse the warrant or return it to the board.

Wash. Admin. Code 250-80-070
Renewals and authorized use period.

(1) Eligible students may renew their award for the second year's benefits, subject to the availability of funding.

(2) The deadline for the return of renewal applications will be set annually by the board.

(3) The board will determine the maximum number of years each class of graduating high school seniors has to complete usage of the scholarship.

(4) For the graduating classes of 1999 and 2000, the authorized use period is limited to two consecutive years following graduation. Students who were not eligible for the first year of benefits, or who did not use the first year of benefits, may reapply for the second year benefits, but may not renew for a third year.

(5) Receipt of the scholarship is dependent upon the availability of funding.

Wash. Admin. Code 250-80-080
Appeals.

(1) The board will set an annual deadline for the receipt of appeals.

(2) Appeals must be submitted to the board in writing before the application deadline.

(3) The board may use its judgment to except individual students from a program rule or rules based on substantial documented mitigating circumstances.

Wash. Admin. Code 250-80-090
The account.

(1) The Washington promise scholarship account is established in the custody of the state treasurer for the purpose of administering the Washington promise scholarship program.

(2) The annual allotment is to be deposited into the account for the purpose of making commitments to students for future scholarship payments, disbursements of the scholarship awards, and for the administrative expenses of the program, as limited by the board's biennial budget provisos.

(3) All moneys not claimed by students, the refund of tuition and fees, and contributions from nonstate sources are to be deposited into the account and used for future payments.

Wash. Admin. Code 250-80-100
Program administration.

(1) The higher education coordinating board shall administer the program. The board shall be responsible for:

(a) Collection of student applications;

(b) Determination of student eligibility;

(c) Determination of the eligibility of postsecondary institutions within Washington;

(d) Adjudication of all appeals;

(e) Disbursement of awards; and

(f) Maintenance of records.

(2) The OSPI shall be responsible for:

(a) Certifying the list of qualified high schools in the state of Washington;

(b) Providing guidance to high schools as to how the top ten percent or fifteen percent of each senior graduating class shall be determined;

(c) Specifying the number of students per high school that may be named as comprising the top ten percent or top fifteen percent of the graduating class;

(d) The collection and compilation of the list from each high school of the top ten percent or top fifteen percent of each graduating high school class; and

(e) The delivery of that list to the board.

Supreme Court, U.S.
FILED
JUL 17 2003
OFFICE OF THE CLERK

No. 02-1315

IN THE SUPREME COURT OF THE UNITED STATES

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, ET AL.,

Petitioners,

v.

JOSHUA DAVEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

The Washington Constitution provides that no public money shall be appropriated or applied to religious instruction. Following this constitutional command, Washington does not grant college scholarships to otherwise eligible students who are pursuing a degree in theology. Does the Free Exercise Clause of the First Amendment of the United States Constitution require the state to fund religious instruction, if it provides college scholarships for secular instruction?

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 299 F.3d 748. Pet. 1a-50a. The court's order denying the petition for rehearing and for rehearing en banc is unpublished. Pet. 86a-87a. The opinion of the United States District Court for the Western District of Washington is also unpublished. Pet. 51a.

JURISDICTION

The judgment of the Ninth Circuit was entered July 18, 2002. Pet. 1a. On November 26, 2002, the Court of Appeals issued an order denying a timely petition for rehearing and petition for rehearing en banc. Pet. 86a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Free Exercise Clause of the First Amendment to the United States Constitution provides: "Congress shall make no law . . . prohibiting the free exercise [of religion.]"

The Washington Constitution article I, § section 11 provides, in part:

> "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment[.]" Pet. 88a.

Wash. Rev. Code § 28B.10.814 provides: "No aid shall be awarded to any student who is pursuing a degree in theology." Pet. 92a.

Other relevant statutes and regulations include the legislative appropriation that began the Promise Scholarship program (Pet. 89a-91a), the statutes establishing the program on a continuing basis (Pet. 92a-96a), and the regulations adopted to implement the program (JA 178-87).

STATEMENT

This case concerns a challenge to the Washington Constitution and a state statute that prohibit using public funds to pay for religious instruction. The question is whether the Free Exercise Clause of the First Amendment of the United States Constitution requires the state to pay for religious instruction when it pays for secular instruction.

1. Religious Freedom Section Of The Washington Constitution

Adopted in 1889 as part of the original Washington Constitution, article I, section 11 guarantees religious freedom for Washington citizens.[1] Article I, section 11 begins by guaranteeing freedom of conscience in matters of religion and limiting government authority that impacts religious activities:

[1] The 1889 Washington Constitution also provided that: "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence." Wash. Const. art IX, § 4 This provision applies only to primary and secondary schools and not to higher education institutions. *State ex rel. Gallwey v. Grimm*, 146 Wash. 2d 445, 464, 48 P.3d 274, 284 (2002).

> "Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion[.]" Wash. Const. art. I, § 11, Pet. 88a.

In tandem with this limit on government authority, article I, section 11 contains an explicit prohibition on government funding of religious activities:

> "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment[.]" Wash. Const. art. I, § 11, Pet. 88a.

This provision has long been interpreted as establishing a clear demarcation, broadly prohibiting both religious exercises or instruction in the public schools and the public funding of such activities. Two years after statehood, in 1891, the Washington Attorney General concluded that article I, section 11 prohibited teachers in the public schools from conducting devotional or religious exercises during the school day. 1 Op. Att'y Gen. 142 (1891). According to the Attorney General, the provisions of article I, section 11 were not "the work of the enemies, but of the friends of religion". 1 Op. Att'y Gen. at 145. The framers and the people "were unwilling that any avenue should be left open for the invasion of the right of absolute freedom of conscience in religious affairs". 1 Op. Att'y Gen. at 145. According to the Attorney General, the framers and the people

"were unwilling that any man should be required, directly or indirectly, to contribute toward the promulgation of any religious creed, doctrine or sentiment to which his conscience did not lend full assent". 1 Op. Att'y Gen. at 145.

In *State ex rel. Dearle v. Frazier*, 102 Wash. 369, 370, 173 P. 35 (1918), the Washington Supreme Court quoted this Attorney General Opinion with approval when it concluded that a proposal to include religious instruction in the curricula of public high schools violated article I, section 11.[2]

This provision of article I, section 11 provides for greater separation of church and state than the First Amendment. In *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986) (*Witters* II), this Court ruled that a Washington financial aid program did not violate the Establishment Clause, even though the recipient was "studying the Bible, ethics, speech, and church administration in order to equip himself for a career as a pastor, missionary, or youth director". *Witters* II, 474 U.S. at 483. On remand, in *Witters v. Washington Commission for the Blind*, 112 Wash. 2d

[2] Justice Brennan noted the Washington Supreme Court's decision in *Dearle* when he found it "remarkable that the courts of a half dozen States found compulsory religious exercises in the public schools in violation of their respective state constitutions" in the late nineteenth century when the First Amendment had not yet been applied to the states and many state constitutional provisions were less rigorous than the Establishment Clause. *Sch. Dist. of Abbington Township v. Schempp*, 374 U.S. 203, 275 & n.51 (1963) (Brennan, J., concurring).

363, 771 P.2d 1119 (1989), *cert. denied sub nom. Witters v. Washington Department of Services for the Blind*, 493 U.S. 850 (1989) (*Witters* III), the Washington Supreme Court held that providing the funds would violate article I, section 11, which prohibits "the *application* of public funds to religious instruction". *Witters III*, 112 Wash. 2d at 370, 771 P.2d at 1122. The court also rejected Witters' Free Exercise claim. *Id.* at 372, 1123 ("[T]he Commission's only action was to refuse to pay for his theological education. The Commission's decision may make it financially difficult, or even impossible, for [an] applicant to become a minister, but this is beyond the scope of the free exercise clause. We hold that the Commission's refusal to provide financial assistance did not violate the free exercise clause of the federal constitution.").

2. The Washington Constitution Does Not Prohibit The Secular Study Of Comparative Religion

Although the Washington constitution forbids using public funds for religious instruction–that is, instruction that inculcates belief (or disbelief) in God–it does not prohibit the secular study of the topic of religion. In *Calvary Bible Presbyterian Church v. Board of Regents*, 72 Wash. 2d 912, 436 P.2d 189 (1967), *cert. denied*, 393 U.S. 960 (1968), the court ruled that teaching the Bible as literature did not violate article I, section 11. According to the court, the constitution's bar on religious instruction only forbids public funding of "that category of instruction that resembles worship and manifests a devotion to religion and religious principles in thought, feeling, belief, and

conduct". *Calvary Bible Presbyterian Church*, 72 Wash. 2d at 919, 436 P.2d at 193. Thus, public colleges and universities in Washington teach about religion, but do not provide instruction to inculcate belief or disbelief in the doctrine of a particular religion. For example, the University of Washington offers a number of courses in comparative religion. JA 66-74. But none of these courses are devotional in nature or designed to induce religious faith. Instead, religious ideas are studied as an aspect of the general intellectual and cultural history of societies and civilizations. JA 84, ¶ 3.

In addition to funding public colleges and universities, Washington provides financial assistance to individuals attending private institutions of higher education. The same constitutional line governs this scholarship aid as applies to the public colleges and universities supported by the state—the state will fund secular education, but not religious instruction. To this end, in 1969, the Washington Legislature adopted Wash. Rev. Code § 28B.10.814, which provides: "No aid shall be awarded to any student who is pursuing a degree in theology." Pet. 92a.

3. The Promise Scholarship Program

In 1999, the Washington Legislature created the Promise Scholarship program, to be administered by the Higher Education Coordinating Board (HEC Board). The scholarships are only available to students graduating from a public or private high school located in Washington. Wash. Admin. Code § 250-80-020(12)(a), JA 180. To receive the scholarship, a student must meet academic, income, and enrollment eligibility requirements. JA 180. First, the student must meet one of three academic

criteria—(1) graduate in the top fifteen percent of his or her graduating class, or (2) attain a cumulative score of 1200 or better on the Scholastic Assessment Test I, or (3) attain a score of 27 or better on the American College Test. Wash. Admin. Code § 250-80-020(12)(b)-(d), JA 180.

Second, under the income requirement, the student must have a family income less than 135% of the state's median. Wash. Admin. Code § 250-80-020(12)(e), JA 180.

Finally, there are three enrollment requirements. First, the student must enroll in an eligible post-secondary institution located in Washington. Wash. Admin. Code § 250-80-020(12)(f), JA 180. Eligible institutions include both public institutions authorized by the Washington Legislature and private institutions accredited by a nationally recognized accrediting body. Wash. Admin. Code §250-80-020(13), JA 180. Under the criteria, private religious institutions qualify if they are accredited. Second, the student is enrolled at least half time. Wash. Admin. Code § 250-80-020(12)(f), JA 180. Third, the student is not using the scholarship to pursue a theology degree. Wash. Admin. Code § 250-80-020(12)(g), JA 180.

The maximum amount of the scholarship is limited to the average annual tuition and fees for resident students attending the state's community and technical colleges, as determined by the HEC Board. Wash. Admin. Code § 250-80-050(1), JA 183-84. The program is funded through the state general fund, and there is no federal money involved. JA 134. The actual amount of the scholarship depends on the annual appropriation, which is

evenly prorated among the eligible students. Wash. Admin. Code § 250-80-050(2), JA 184. For example, in 1999 the maximum award was $1,584. JA 53. The actual award was $1,125. JA 57.

Students seeking a Promise Scholarship submit a completed application to the HEC Board. Wash. Admin. Code § 250-80-030(1), JA 182. The HEC Board notifies students who meet the academic and income requirements that they are eligible to receive the Promise Scholarship if they meet the enrollment requirements. JA 95.

When a student enrolls at an eligible institution, the school confirms the enrollment requirements. The institution must certify to the HEC Board (1) that the student has been matched and verified as eligible against the list of eligible students provided by the HEC Board; (2) that the student is enrolled at least half time; and (3) that the student is not pursuing a degree in theology. JA 59-60. It is up to the school the student is attending to determine, as the one with the best knowledge of its curriculum, whether the student is pursuing a degree in theology. JA 126, 131, 137. The HEC Board does not make this determination. JA 128-30.

If the student meets the enrollment requirements, the scholarship funds are sent to the institution for distribution to the student. Wash. Admin. Code § 250-80-060, JA 184-85. If a student enrolls in two schools during the same term, the scholarship may be used at only one of them. JA 58. Eligible students may renew their scholarship for a second year, subject to available funding. Wash. Admin. Code § 250-80-070, JA 185.

4. Joshua Davey's Application For The Promise Scholarship

When Joshua Davey was a senior in high school, he learned about the newly created Promise Scholarship program. Davey applied for the scholarship since he was graduating from a school located in Washington and met the academic and income requirements.[3] JA 41. In August 1999, Davey was notified by Marcus Gaspard, the Executive Director of the HEC Board, that he was eligible to receive the scholarship, subject to the enrollment requirements. JA 53-54. The amount of the scholarship was $1,125. JA 57. Davey also received a letter of congratulations on his eligibility from Washington Governor Gary Locke. JA 55-56.

Davey is a Christian committed to living out his faith in every aspect of his life. Because of his religious beliefs, he had planned for many years to attend a Bible college to prepare himself for a lifetime of ministry as a church pastor. JA 40. Davey chose to attend Northwest College. Northwest College is an eligible school located in Washington. JA 130.[4] Northwest has Departments

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[3] The Promise Scholarship began as a pilot program in the 1999 appropriations act. 1999 Wash. Laws ch. 309(6)(i), Pet. 89a. Subsequently, in March 2002, the Promise Scholarship was adopted as a continuing statutory program and the HEC Board adopted rules. *See* Wash. Rev. Code §§ 28B.119.010-.020, Pet. 92a-96a; Wash. Admin. Code §§ 250-80-101 to 250-80-100, JA 178-87. Since 1999, the relevant eligibility requirements to receive the scholarship have remained the same.

[4] During the 1999-2000 academic year, 15 students who attended Northwest College received Promise Scholarships. JA 145.

of Religious Studies, Education, Nursing, and Arts and Sciences. JA 147.

Northwest's concept of education is distinctly Christian in the evangelical sense. It recognizes the Bible as the divine communication of truth. JA 168. The purpose of the Department of Religious Studies is to prepare students for the ministry. JA 148. Davey chose Northwest College because he could train to be a minister at a reasonable cost. JA 41. He decided on a double major—Pastoral Ministries and Business Management and Administration. JA 43. The courses Davey would take in his Pastoral Studies major teach the Bible as truth, whereas a purely academic understanding would not necessarily subscribe to the Bible as ultimate truth. JA 110-11.

In October 1999, Davey met with Lana Walter, Director of Financial Aid at Northwest College. She verified that Davey was on the HEC Board list of students who met the academic and income requirements for the scholarship. However, she determined that Davey did not meet the enrollment requirements, because he was pursuing a degree in theology. At Northwest College, students in the Department of Religious Studies are majoring in theology. Thus, Northwest "determined which students on the list were majoring in our Religious Studies, and . . . did not request a warrant from the State". JA 147.[5] Davey does not dispute the fact

[5] Davey was under the impression that to receive the scholarship he had to sign a form stating that he was not pursuing a degree in theology. JA 46. Although he did not see the form, he refused to sign it. JA 46, 103. This appears to be a form developed by Northwest. According to Walter, for other state programs the students must sign a form and "we have added that to the Promise Scholarship recipients as well". JA 166. (The form, titled Washington Promise Scholarship Condition Of Award, is set out in the record at JA 92-93.) In fact, the HEC Board does not require students to sign a condition of award letter and did not create any form for Promise Scholarship recipients to sign. The only thing the HEC Board requires is certification by the institution itself regarding the eligibility of the student. JA 86, 89.

that his Pastoral Studies major constitutes pursuing a degree in theology. JA 104. And because he was pursuing a degree in theology, he did not receive the Promise Scholarship for the 1999-2000 academic year.

In August 2000, Davey was informed that he was eligible–subject to the enrollment requirements–to receive the Promise Scholarship for a second year, covering the 2000-2001 academic term. This time the scholarship was in the amount of $1,542. JA 95. In October 2000, Northwest College sent a letter informing him that "[i]t is our understanding from the Registrar's Office that you have declared a major in religious studies. Consequently, Northwest College is unable to request funds for the Washington State Promise Scholarship." JA 97.

The basis for denying Davey the scholarship is that he did not meet the enrollment requirements. Davey was not denied the scholarship because he identified himself as a Christian, and no one ever told him that the Promise Scholarship would require him to refrain from discussing his religious beliefs. JA 116-17. Davey was also never told that the Promise Scholarship would require him to stop associating with any particular individuals. JA 117.

5. Denial Of The Scholarship Did Not Prevent Davey From Pursuing A Degree In Theology

The lack of scholarship funds did not prevent Davey from pursuing his Pastoral Studies major at Northwest. JA 116. In addition, Davey could have received the Promise Scholarship and pursued both a business degree and a theology degree. If Davey had attended Northwest College half time and majored only in Business Management and Administration he would have met the enrollment requirements to receive the Promise Scholarship. Nothing would have prevented him from enrolling in another college to pursue his theology degree. If a student enrolls in two schools during the same term, the Promise Scholarship may be used at only one of them. JA 58. Thus, Davey would have to use his own funds to pay for his theology degree. Nothing in the Promise Scholarship program would have prevented him from doing so.

6. Proceedings Below

In January 2000, Davey brought suit in the United States District Court for the Western District of Washington against the Governor of Washington, Gary Locke, and officials of the HEC Board, in their official and individual capacities (collectively, the HEC Board). JA 4-23. Davey alleged violations of the First and Fourteenth Amendments of the United States Constitution, as well as provisions of the Washington Constitution. Davey sought a declaratory judgment that Washington's refusal to fund his degree in theology was unconstitutional. Davey also sought an injunction, damages, and attorneys

fees. In March 2000, the district court denied Davey's motion for a preliminary injunction. JA 75.

The parties filed cross motions for summary judgment, and in October 2000, the district court issued an order granting the HEC Board's motion for summary judgment and denying Davey's motion for summary judgment. Pet. 51a-85a.

The district court rejected Davey's challenge under the Free Exercise Clause of the First Amendment relying on *Lyng v. Northwest Indian Cemetery Protection Association*, 485 U.S. 439 (1988) (logging and road-building in forest on federal lands traditionally used by Native American tribes for religious rituals not subject to strict scrutiny), and *Regan v. Taxation With Representation*, 461 U.S. 540 (1983) (a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right and, thus, is not subject to strict scrutiny). Pet. 67a. The court reasoned that while a citizen may not be unduly prohibited from practicing his religion, he may not demand that the government pay for his religious pursuits. Pet. 67a-68a. According to the court, "[t]here is no dispute that [the HEC Board] has not prohibited Davey from studying pastoral ministries." Pet. 68a. The court distinguished *Sherbert v. Verner*, 374 U.S. 398 (1963) (requiring a person to work on Saturday in violation of her religion to obtain unemployment compensation must be justified by a compelling state interest), based on *Employment Division, Department of Human Resources v. Smith*, 492 U.S. 872 (1990) (general law prohibiting use of peyote employed in religious ceremony is not subject to strict scrutiny). According to the district court, *Smith* noted the

limitations of *Sherbert* and recognized that the Court has consistently refused to apply the holding outside the unemployment compensation area. Pet 69a. The district court also distinguished *Sherbert* because, in *Smith*, the Court held that the compelling interest test of *Sherbert* would only be applied in *Sherbert's* limited factual context. Pet. 70a-71a. Finally, the district court distinguished *McDaniel v. Paty*, 435 U.S. 618 (1978) (law prohibited minister from exercising constitutional right to hold office). According to the district court, McDaniel had a constitutional right to seek office. But unlike McDaniel, Davey does not have a constitutional right to have Washington fund his religious instruction. Pet. 71a-72a.

The district court rejected Davey's claim that the HEC Board violated his rights under the Establishment Clause of the First Amendment. The court concluded that the Establishment Clause does not require the government to provide assistance to make the practice of religion easier. Pet. 72a-73a.

The district court also rejected Davey's claims that his First Amendment rights of speech and association were violated. With regard to the free speech claim, the district court held that Davey had not identified any restriction on his freedom to speak and that he had no basis for requiring the state to fund the exercise of his First Amendment rights. Pet. 73a-74a. The district court distinguished *Rosenberger v. Rector & Visitors*, 515 U.S. 819 (1995) (limited public forum established by university for student speech could not exclude religious speech). The district court concluded that *Rosenberger* did not apply because the Promise Scholarship did not create

a public forum. The purpose of the program was not to subsidize student speech, but simply to pay for educational expenses. Pet. 75a-77a. The district court rejected Davey's freedom of association claim because the only evidence he presented was that he had to spend a few extra hours a week working instead of spending the time with his fellow students. The court concluded that this *de minimis* burden was wholly insufficient to make out a claim under the First Amendment. Pet. 78a-80a.

Finally, the district court rejected Davey's claim under the Due Process Clause of the Fourteenth Amendment. The court ruled that none of Davey's constitutional rights were abridged. That being so, there was a rational basis for the state's refusal to fund Davey's religious education. That basis was the state's interest in preventing violations of the state's constitutional establishment clause. Pet. 80a-82a.[6]

Davey filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit. At the same time, Davey moved the district court for a temporary injunction pending appeal. In this motion, Davey sought to require the HEC Board to put $1,542 in escrow pending the outcome of the appeal. This is the amount of the Promise Scholarship for the 2000-2001 academic year. In response, the HEC Board offered to set aside that amount in its operating budget, to be paid to Davey if his appeal was successful. Based on that offer, the

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[6] The district court also rejected Davey's claims that the HEC Board violated provisions of the Washington Constitution. Pet. 57a-66a.

district court denied Davey's motion. JA 171a-74a. The parties filed with the court their agreement for the escrow of the funds. JA 175-77.

On appeal, a divided panel of the Ninth Circuit reversed the district court and held that the HEC Board violated Davey's rights under the Free Exercise Clause of the First Amendment. Pet. 1a-50a. The majority did not address Davey's other constitutional claims.

The majority began its analysis by noting the competing lines of authority the parties relied on. Davey argued that he was singled out for unfavorable treatment in an otherwise neutral program on account of religion in violation of the free exercise rule of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (law prohibiting killing animals only when killing was part of religious ceremony discriminated against religion and was subject to strict scrutiny). Davey also argued that a state offering a benefit may not impose a disability on the basis of religious status, citing *McDaniel v. Paty*, 435 U.S. 618 (1978). Thus, the limit on the Promise Scholarship cannot stand unless it serves a compelling state interest. Pet. 11a. On the other hand, the HEC Board argued that declining to subsidize the exercise of a constitutional right is permissible and does not infringe that right based on *Rust v. Sullivan*, 500 U.S. 173 (1991), and *Regan v. Taxation With Representation*, 461 U.S. 540 (1983). Pet. 12a.

The majority concluded that *Rust* and *Regan* did not apply for two reasons. First, according to the majority, the programs in *Rust* and *Regan* were set up for the government's own purpose as a

speaker. In contrast, the majority claimed that the purpose of the Promise Scholarship program was broad and must therefore be viewpoint neutral under *Rosenberger*. Pet. 12a. *Rosenberger* held that a limited public forum, established by the university to facilitate student speech, could not exclude religious speech. The majority expanded this concept and concluded that the government may limit the scope of a program it will fund, "but once it opens a neutral 'forum' (fiscal or physical), with secular criteria, the benefits may not be denied on account of religion". Pet. 21a.

Second, the majority distinguished *Rust* and *Regan* based on *McDaniel*. According to the majority, the state cannot offer a public benefit to all but exclude some on the basis of religion. In *McDaniel*, state law prohibited ministers from being delegates to the state constitutional convention. The majority found the situation here to be analogous in that a would-be minister could not receive a Promise Scholarship. Pet. 15a-16a.

The majority also concluded that Wash. Rev. Code § 28B.10.814, which provides that aid cannot be used to fund a degree in theology, is not neutral under *Lukumi*. The majority reached this conclusion even though it acknowledged that the statute "neither prohibits religious conduct nor does its application turn on a student's religious motivation". Pet. 14a. Nevertheless, the majority concluded that the statute was not neutral because the statute and implementing policy discriminate against religion by excluding only those students who declare a major in theology that is taught from a religious perspective. Pet. 14a-15a.

Having concluded that Wash. Rev. Code § 28B.10.814 was not neutral under *Lukumi*, the majority applied strict scrutiny. Pet. 25a. The majority went on to hold that the restriction on the Promise Scholarship was invalid because the state's interest in complying with the constitutional restriction in article I, section 11 was not compelling. Pet. 25a-30a.

The dissenting judge began by observing that "[t]his is a funding case, not a free exercise case or a free speech case." Pet. 33a. The dissent rejected the application of *Lukumi* and *McDaniel*, because those cases involved laws that burdened the exercise of constitutional rights. In the dissenting judge's view, the law at issue in *Lukumi* prohibited "the ritualistic slaughter of animals—that constitute a central practice of the Santeria religion". Pet. 34a. Thus, for church members, "[t]heir choice was to practice their religion upon threat of prosecution." Pet. 34a. Similarly, *McDaniel* pitted a minister's constitutional right to seek and hold office as a state citizen against a constitutional right to be a minister. Pet. 36a. In contrast to fundamental rights at issue in *Lukumi* and *McDaniel*, the dissent found that Davey's claim did not involve a "constitutional right to educational funding". Pet. 37a. According to the dissent, "Washington has neither prohibited nor impaired Davey's free exercise of his religion. He is free to believe and practice his religion without restriction." Pet. 32a. The only state action was "a decision consonant with the state constitution, not funding 'religious . . . instruction'". Pet. 32a.

The dissent also concluded that the state's long-standing policy, of preventing state interference

with religious practice by strictly limiting state involvement in religious instruction, could not support the majority's conclusion that the state was aiming to suppress disfavored religious ideas. Pet. 20a. Finally, the dissent rejected applying *Rosenberger*. In the dissent's view, this is not a free speech case and "the decision not to fund Davey's pursuit of a pastoral ministry degree does not implicate the free speech viewpoint concerns that drove the Court's decision in *Rosenberger*". Pet. 45a. The dissent pointed out that Northwest College is an eligible institution, even though it is a religious college, and concluded that there was no concern that Washington "has precluded, will preclude, or is even likely to preclude Davey from being exposed to the pervasively Christian perspective that permeates every aspect of his educational experience at Northwest College". Pet. 46a. Thus, choosing not to fund his theology degree would not limit Davey's exposure to a Christian viewpoint.

In the dissent's view, the controlling legal precedents were *Maher v. Roe*, 432 U.S. 464 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980), which stand for the proposition that government decisions not to underwrite fundamental rights do not abridge those rights. Pet. 44a. Applying this principle, the dissent concluded that Washington had no obligation to fund Davey's theology degree.

After the Ninth Circuit's decision, the HEC Board filed a timely petition for rehearing and petition for rehearing en banc, which was denied. Pet. 86a-87a. The HEC Board filed a petition for a writ of certiorari, which was granted May 19, 2003.

SUMMARY OF ARGUMENT

The exclusion of a theology degree from the scope of Washington's Promise Scholarship program does not violate the Free Exercise Clause of the First Amendment.

1. This Court has held the government's decision not to fund the exercise of a fundamental right does not infringe that right. *Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980); *Regan v. Taxation With Representation*, 461 U.S. 540 (1983); *Rust v. Sullivan*, 500 U.S. 173 (1991); *Nat'l Endowment For The Arts v. Finley*, 524 U.S. 569 (1998). This case falls squarely within this principle. Washington's decision not to subsidize religious instruction to implement its state constitutional policy of separation of church and state does not infringe Davey's right to seek a theology degree. The scholarship program leaves Davey in the same position he would occupy in the absence of a state funding program—able to obtain a theology degree using other funds available to him.

This is not a case where the state has conditioned the receipt of a benefit on the relinquishment of the right to engage in constitutionally protected religious activities. The Promise Scholarship does not impose "unconstitutional conditions" on the recipient of the funding. *See Speiser v. Randall*, 357 U.S. 513 (1958). Rather, it limits only the uses to which the program's funds may be applied. Students pursuing a theology degree at one institution may still use the scholarship to pursue a separate–secular–degree at a second school. Thus, there is no requirement for a relinquishment of rights that prohibits the recipient

from engaging in protected conduct. There is only a limit on the scope of the funding program.

Nor do the funding restrictions that apply to the Promise Scholarship aim at the suppression of views because they are considered "dangerous" or "disfavored" like the views involved in *Speiser* and *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001). Rather, like the funding restrictions at issue in *Rust*, the enrollment requirement applies only to the scholarship program and is only for the purpose of furthering the state policy (here, avoiding government funding of religious instruction). The program does not suppress views that would otherwise be expressed or eliminate other channels of communication.

2. The enrollment requirements of the Promise Scholarship program do not prohibit or burden Davey's religious beliefs or practices in violation of the Free Exercise Clause. The state does not impose regulatory requirements or impact Davey's practice of religion beyond the choice not to fund his degree in theology. Nevertheless, the Ninth Circuit majority held that Washington's Promise Scholarship law is not neutral and is subject to strict scrutiny under *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). It concluded that the Promise Scholarship program is discriminatory because it funds the secular study of religion and excludes only theology "taught from a religious perspective". Pet. 15a. The Ninth Circuit majority mistook the neutral distinction between secular and religious instruction for discrimination and a lack of neutrality that suppresses

religion. This approach ignores the distinction between secular and religious instruction that has been made under both the federal and state constitutions, and for similar non-discriminatory objectives: to avoid official support through the levy of taxes for religious activities.

3. Additionally, the Ninth Circuit majority concluded that the Promise Scholarship program constituted a limited fiscal forum that must be administered on a viewpoint neutral basis under *Rosenberger v. Rector & Visitors*, 515 U.S. 819 (1995). But the purpose of the Promise Scholarship is not to create a forum for the exchange of a diversity of views, but to facilitate the education of low and middle income students. *Rosenberger* does not apply, just as it did not apply to a library's acquisition of Internet terminals and books to facilitate research and learning in *United States v. American Library Association*, 123 S. Ct. 2297 (2003).

The judgment of the Ninth Circuit should be reversed

ARGUMENT

1. Washington Is Not Required To Subsidize Davey's Constitutional Right To Pursue A Degree In Theology

The State of Washington funds a system of public universities and colleges. They teach numerous subjects—including comparative religion. But they cannot provide religious instruction, that is, instruction "that resembles worship and manifests a devotion to religion and religious principles in

thought, feeling, belief, and conduct". *Calvary Bible Presbyterian Church v. Board of Regents*, 72 Wash. 2d 912, 919, 436 P.2d 189, 193 (1967), *cert. denied*, 393 U.S. 960 (1968). This is forbidden by article I, section 11 of the Washington Constitution. Assistance to students seeking a college education at private schools through the Promise Scholarship is governed by the same constitutional distinction. The state provides financial assistance for all manner of secular instruction, but Wash. Rev. Code § 28B.10.814 prohibits granting aid to any student who is pursuing a degree in theology. Pet. 92a. There is no question that Davey has a constitutional right to practice his religion, including pursuing a degree in theology. However, he does not have a constitutional right to have the State of Washington pay for it.

This case turns on the application of two constitutional principles. First, a "legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right". *Rust*, 500 U.S. at 193. Second, the government may not condition the receipt of a benefit on the relinquishment of a constitutional right. *Speiser*. In this case, the first principle controls because the state does not require Davey to relinquish a constitutional right in order to receive a Promise Scholarship.

A. The State's Decision Not To Fund Davey's Theology Degree Does Not Infringe His Right To Seek The Degree

This Court has consistently held that the legislature's decision not to fund the exercise of a constitutional right does not infringe that right. The

Court has applied this principle to a number of different government funding programs. *Maher* (no right to Medicaid funding for medical services incident to constitutionally protected right to nontherapeutic abortions); *Harris* (no right to Medicaid funding for medical services incident to constitutionally protected right to medically necessary abortions); *Regan* (no right to tax exempt status for nonprofit organizations engaged in constitutionally protected lobbying activities); *Rust* (no right to federal funds to engage in constitutionally protected family planning service related to abortion); *Finley* (no right to federal funds for artists whose works do not meet general standards of decency); *American Library Ass'n*, 123 S. Ct. at 2308 (plurality) (no right to federal funds to pay for unfiltered access to the internet).

Like the constitutionally protected rights of free speech and reproductive choice, there is no question that Davey has the right to practice his religion—including pursuing a degree in theology. But under this Court's precedent, Davey does not have the right to have the State of Washington subsidize his exercise of that constitutional right. Moreover, the fact that Washington will not subsidize Davey's right to pursue a theology degree does not prevent him from seeking that degree. The Promise Scholarship enrollment requirements apply only to the institution where the scholarship will be used. If Davey had met the enrollment requirements at Northwest College, he

would have received the scholarship, and he still could have pursued his theology degree at another school—using his own funds.

The Ninth Circuit majority was under the impression that, if Davey accepted the scholarship, he could not pursue a degree in theology—even if he used non-government funds to do so. Pet. 24a. The majority was in error. The enrollment requirements are directed at the school where the scholarship is used. Thus, the HEC Board required Northwest to be an accredited institution located in Washington, to verify that Davey was the same individual who met the academic and income eligibility requirements, and to certify that Davey was enrolled at least half time and was not pursuing a degree in theology. Northwest makes the decision about whether a student is pursuing a theology degree based on its own superior knowledge of its curriculum. JA 126, 131, 137.

If Davey had met the enrollment requirements at Northwest by taking a degree in Business Management and Administration, he would have received the Promise Scholarship. But none of those enrollment requirements–once satisfied at Northwest–would have prevented Davey from simultaneously using his own money to pursue a theology degree in a separate program at a second school.

In fact, Washington has no interest in preventing Davey from using his own funds to obtain a theology degree. Article I, section 11 provides: "No *public money or property* shall be appropriated for or

applied to any religious worship, exercise or instruction, or the support of any religious establishment[.]" (Emphasis added.) There is no constitutional restriction on individuals using their own money to exercise their religious rights.

B. Washington Does Not Condition Receipt Of The Promise Scholarship On The Relinquishment Of A Constitutional Right

The Promise Scholarship does not implicate the second legal principle relevant to this case—that the government may not condition the receipt of a benefit on the relinquishment of a constitutional right. The Court's "'unconstitutional conditions' cases involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program". *Rust*, 500 U.S. at 197. For example, in *Speiser*, California had a veteran's property tax exemption. To qualify, a veteran had to sign an oath that he or she did not advocate the overthrow of the government of the United States or California by force of violence or other unlawful means. *Speiser*, 357 U.S. at 515. The Court struck down this requirement because "the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech". *Id.* at 519. In *Speiser*, the veteran had to sign the oath or lose the tax exemption. The condition broadly prohibited the veteran from engaging in protected conduct.

In contrast to *Speiser*, Davey need not forfeit his right to pursue a theology degree as a condition of receiving the Promise Scholarship. Nothing prohibits Davey from pursuing a theology degree outside of the Promise Scholarship program.[7] In situations where the only condition is limiting the use of public funds for the specific activity at issue, the Court has not found unconstitutional conditions and has applied the first principle that the government's decision not to subsidize the exercise of a fundamental right does not infringe that right.

Thus, in *Maher* and *Harris*, the government did not fund abortions, but this did not interfere with a woman's constitutional rights because she could still obtain an abortion using her own funds. There was no condition on the recipient. *Maher*, 432 U.S. at 474 ("An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires."); *Harris*, 448 U.S. at 317 ("the Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all").

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[7] Further, Wash. Rev. Code § 28B.10.814 on its face belies any "unconstitutional condition". Davey's case would be a different one, and the one the Ninth Circuit found, if the statute stated: "No aid shall be awarded to any person who ever plans to become a minister." The statute, however, places no such condition on the recipient; it restricts only the type of instruction that the state financial aid programs will underwrite.

Similarly, in *Regan*, the Court upheld the federal law that denied tax exempt status to nonprofit corporations that engaged in lobbying activities. The Court found that the plaintiff in that case could receive tax exempt status and lobby if it set up an affiliate organization to ensure that none of the tax exempt contributions were used for lobbying. *Regan*, 461 U.S. 544 ("TWR can obtain tax deductible contributions for its non-lobbying activity by returning to the dual structure it used in the past, with a § 501(c)(3) organization for non-lobbying activities and a § 501(c)(4) organization for lobbying."). In *Rust*, the Court upheld a requirement that prohibited recipients of grants for family planning services from using grant money to provide information about abortion. But this restriction did prohibit a recipient from providing abortion services using other funds. *Rust*, 500 U.S. at 196 ("The Secretary's regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities.").[8]

On the other hand, the Court has struck down conditions that required a recipient to relinquish a constitutional right. In *FCC v. League of Women Voters*, 468 U.S. 364 (1984), the Court struck down a

[8] Although the Court did not discuss this point, *Finley* and *American Library Association* both are consistent with this principle. In *Finley*, the requirement that projects meet general standards of decency applied only to grant funds, so that the artist was free to create any kind of art using other funds. In *American Library Association*, there was nothing to prevent a library receiving federal funds from establishing an affiliate library, like the affiliate organization in *Regan*, to offer unfiltered internet access.

requirement that prohibited noncommercial radio and television stations that received federal funds from engaging in editorializing. Even though a station received only 1% of its income from the federal government, the station was "barred absolutely from all editorializing". *FCC*, 468 U.S. at 400. The Court noted that it would be different if the law "permitted noncommercial educational broadcasting stations to establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds". *Id.* *Rust* distinguished *FCC* on this basis. *Rust*, 500 U.S. at 197 ("Under that law, a recipient of federal funds was 'barred absolutely from all editorializing' because it 'is not able to segregate its activities according to the source of its funding' and thus 'has no way of limiting the use of its federal funds to all noneditorializing activities.'").

Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001), also follows this pattern. *Velazquez* concerned federal grants to organizations that provided legal services to indigent clients. Organizations accepting the funds were prohibited from "litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system". *Velazquez*, 531 U.S. at 538. The Court struck this requirement down in part because indigent clients were forced to forfeit entirely government-funded legal services. The Court distinguished *Rust* because, in that case, the recipient of federal funds could use other funds to provide abortion related services. In the words of the Court, "[in *Rust*], a patient could receive the approved Title X family planning counseling funded by the Government and later could consult an affiliate or independent

organization to receive abortion counseling." *Velazquez*, 531 U.S. at 547. But the indigent client in *Velazquez* was required to forfeit all LSC assistance. According to the Court, "[u]nlike indigent clients who seek LSC representation, the patient in *Rust* was not required to forfeit the Government-funded advice when she also received abortion counseling through alternative channels. Because LSC attorneys must withdraw whenever a question of a welfare statute's validity arises, an individual could not obtain joint representation so that the constitutional challenge would be presented by a non-LSC attorney, and other, permitted, arguments advanced by LSC counsel." *Id.*

Of course, the government cannot "discriminate invidiously in its subsidies in such a way as to aim at the suppression of dangerous ideas". *Regan*, 461 U.S. at 548 (internal punctuation omitted). Restrictions that are designed to "single out a particular idea for suppression because it [is] dangerous or disfavored" are improper. *Velazquez*, 531 U.S. at 541. But this principle is consistent with the previously discussed broader principle that the government may not condition the receipt of a benefit on the relinquishment of a constitutional right. Programs that require such a relinquishment have been viewed by the Court as suppressing dangerous or disfavored ideas. *See Speiser v. Randall*, 357 U.S. 513, 519 (1958) (the denial of a tax exemption for engaging in certain speech is "frankly aimed at the suppression of dangerous ideas"); *Velazquez*, 531 U.S. at 548-49 (effect of funding restriction is to limit expression of legal theory in judicial system where unrestricted speech is necessary to its proper functioning). On the other

hand, when a program restricts only the use of the government funds provided and other channels of expression are not affected, the funding program is unlikely to involve an attempt to suppress views that are otherwise available. *See Rust*, 500 U.S. at 194-95 (statute authorizing grants for family planning services that could not be used in programs where abortion is a method of family planning was not such impermissible exclusion of a viewpoint).

The funding restrictions that apply to the Promise Scholarship do not seek to suppress a particular point of view. Rather, the restrictions further the policy reflected in the Washington Constitution of separating church and state to further religious freedom for all. There is no broader relinquishment of the right to exercise one's religion. Indeed, the guarantee of "[a]bsolute freedom of conscience in all matters of religious sentiment" in article I, section 11 removes barriers that might otherwise exist to expressing religious views. This guarantee of religious freedom "extends broader protection than the first amendment of the federal constitution". *First Covenant Church v. City of Seattle*, 120 Wash. 2d 203, 229-30, 840 P.2d 174 (1992); *Munns v. Martin*, 131 Wash. 2d 192, 930 P.2d 318 (1997) (government regulations may not be applied to facilities intimately associated with a church's religious mission, unless the government's interest is compelling; therefore a city's ordinance that imposed controls on demolition of historic structures could not interfere with the Catholic church's plan to demolish an old school building and construct a new pastoral center); *Washington v. Balzer*, 91 Wash. App. 44, 53 n.3, 954 P.2d 931 (1998) ("Protection for religious free exercise under the

Washington Constitution is greater than federal constitutional protection particularly in light of the U.S. Supreme Court's recent invalidation of the Religious Freedom Restoration Act in *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997).”). Moreover, the distinction between providing secular and religious education is one endorsed by this Court. *See infra* p. 39. The distinction is not aimed at the suppression of dangerous ideas.

In sum, Davey has a constitutional right to pursue a degree in theology, but the state has no obligation to fund Davey's exercise of this right. The limits on the Promise Scholarship program do not place restrictions on Davey's ability to use his own funds to pursue his theology degree or on his ability to be or become a minister. Rather, the conditions place limitations only on the use of program funds. These conditions were not intended to and do not operate to suppress a disfavored view.

2. Washington's Decision Not To Fund Davey's Degree In Theology Does Not Violate The Free Exercise Clause

The Court's decisions applying the Free Exercise Clause are consistent with the principle that the government's decision not to subsidize the exercise of a fundamental right does not infringe that right. A government subsidy that does not require the recipient to violate his or her religious convictions as a condition of receiving the benefit does not violate the Free Exercise Clause. Because Davey can receive the Promise Scholarship and still pursue his degree in theology using private funds, he is not required to violate his religious convictions.

A. Neutral Laws Of General Applicability That Impact Religion Are Not Subject To Strict Scrutiny

“The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires.” *Empl. Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 877 (1990). Washington's decision not to apply public funds to pay for Davey's theology degree does not infringe Davy's right to believe and profess his beliefs. Even the Ninth Circuit majority agreed that “Wash. Rev. Code § 28B.10.814 neither prohibits religious conduct nor does its application turn on the student's religious motivation”. Pet. 14a.

The “‘exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation”. *Smith*, 494 U.S. at 877. In judging laws that impact religion under the Free Exercise Clause, this Court's decisions establish “the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice”. *Lukumi*, 508 U.S. at 531.

The “crucial word in the constitutional text is ‘prohibit'”. *Lyng*, 485 U.S. at 451. “For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.” *Id.* Decisions such as *Sherbert v.*

Verner, 374 U.S. 398 (1963), "cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions". *Lyng*, 485 U.S. at 450-51.

In particular, the Court has recognized the difference between "government regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs [and] governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons". *Bowen v. Roy*, 476 U.S. 693, 706 (1986) (plurality opinion). Thus, in cases involving government benefits, the government "meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest". *Id.* at 708.

This standard applies unless there is "proof of an intent to discriminate against particular religious beliefs or against religion in general". *Id.* at 707. "[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest". *Lukumi*, 508 U.S. at 533 (citation omitted).

The Promise Scholarship does not violate the Free Exercise Clause. Wash. Rev. Code § 28B.10.814 and article I, section 11 are neutral laws of general applicability that need not be justified by a compelling state interest. These laws do not prohibit religious conduct or turn on a student's motivation. They also serve a legitimate public interest. The "religious freedom" section of Washington's Constitution, although different in emphasis and application from the Establishment Clause, reflects the same policies. It seeks to avoid compelling support for the advancement of religious doctrines, the establishment of an official religion, and entanglement that accompanies the flow of public funds. A state constitution that is more specific about how these policies are effected and avoids the need for close judgments by adopting a clear demarcation on funding of religious activities is one reasonable approach to addressing these policy concerns. As the Court observed in *Norwood v. Harrison*, 413 U.S. 455 (1973):

> "a State could rationally conclude as a matter of legislative policy that constitutional neutrality as to sectarian schools might best be achieved by withholding all state assistance". *Id.* at 462.

The Ninth Circuit majority ruled that Wash. Rev. Code § 28B.10.814 and article I, section 11 are subject to strict scrutiny. This conclusion is wrong for two reasons. First, the enrollment conditions do not regulate Davey's religious conduct or burden his exercise of religion. Washington only chooses not to fund Davey's degree in theology and any impact on Davey's practice of religion is only

incidental. Second, contrary to the holding of the majority in the court below, the Promise Scholarship does not discriminate against religion when it draws the distinction between secular and religious instruction.

B. Declining To Pay For Davey's Theology Degree Does Not Burden Davey's Free Exercise Of Religion

There is a common thread running through the Court's Free Exercise decisions. They deal with laws that burden the actual practice of religion. Sometimes the Court has struck down these laws and sometimes it has sustained them. But the laws themselves burden the practice of religion. *See, e.g., Reynolds v. United States*, 98 U.S. 145 (1878) (lawprohibiting the practice of polygamy); *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943) (law requiring a business license to distribute religious literature); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (law requiring compulsory school attendance, which was contrary to the Amish religion); *United States v. Lee*, 455 U.S. 252 (1982) (law requiring payment of social security tax, which was contrary to the Amish religion); *Lyng v. NW Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (logging and road-building in forest used for religious purposes); *Empl. Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990) (law prohibiting use of peyote employed in religious ceremony); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (law prohibiting killing animals only when killing as part of religious ceremony).

In some cases, the laws burdening religion have done so by conditioning the receipt of a benefit

on surrender of a religious right and, in these cases, the Court has found a free exercise violation. *Sherbert v. Verner*, 374 U.S. 398 (1963) (law requiring Saturday work in violation of religion to obtain unemployment compensation); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987) (same); *Thomas v. Review Bd. of the Indiana Empl. Sec. Div.*, 450 U.S. 707 (1981) (law requiring weapons-related work in violation of religion to obtain unemployment compensation). These decisions are consistent with the Court's decisions that the government may not condition the receipt of a benefit on the relinquishment of a constitutional right. Indeed, *Sherbert* relied on *Speiser v. Randall*, 357 U.S. 513 (1958). *Sherbert*, 374 U.S. at 405. There is a violation if the government has placed a condition on the recipient's practice of religion. Thus, in *Sherbert*, the government required Sherbert to work on Saturday–in violation of her religious beliefs–in order to receive unemployment compensation. [9]

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[9] There is disagreement on the Court about the continuing vitality of *Sherbert*. *Smith*, 494 U.S. at 484 ("Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law."); *id.* at 898 (O'Connor, J., concurring in the judgment) ("we have never distinguished between cases in which a State conditions receipt of a benefit on conduct prohibited by religious beliefs and cases in which a State affirmatively prohibits such conduct. The *Sherbert* compelling interest test applies in both kinds of cases."). This case does not turn on the *Sherbert* test because, unlike requiring a person to work on Saturday, the denial of the Promise Scholarship is not based on requiring Davey to violate his religious beliefs.

The Ninth Circuit's reliance on *McDaniel v. Paty*, 435 U.S. 618 (1978), is misplaced. *McDaniel* concerned a state law that barred "[m]inisters of the Gospel, or priests of any denomination whatever from serving as delegates to the State's limited constitutional convention". *McDaniel*, 435 U.S. at 620 (internal punctuation omitted). The Court ruled that this law burdened McDaniel's free exercise rights because "McDaniel cannot exercise both rights simultaneously because the State has conditioned the exercise of one on the surrender of the other". *Id.* at 626. According to the Ninth Circuit majority: "Washington's restriction disables students majoring in theology from the benefit of receiving the Scholarship just as Tennessee's classification disabled ministers from the benefit of being a delegate." Pet. 16a. Thus, the majority concluded that:

> "A minister could not be *both* a minister *and* a delegate in Tennessee any more than Davey can be both a student pursuing a degree in theology and a Promise Scholar in Washington." Pet. 16a.

Unlike the laws in these cases, Washington's refusal to apply public funds to Davey's theology degree does not burden his practice of religion. Nor, as we have already explained (*supra* p. 26), does it impose an unconstitutional condition on Davey's receipt of the scholarship. Thus, the problem with the majority's analysis of *McDaniel* is that it is not factually accurate. Davy can be both a student pursuing a degree in theology and a Promise Scholar. He is only prohibited from using his

Promise Scholarship to fund his theology degree. As we have explained (*supra* p. 25), he is free to pursue his theology degree at another school using his own funds.

C. The Promise Scholarship Is A Neutral Law That Does Not Discriminate Against Religion

Under *Lukumi*, Wash. Rev. Code § 28B.10.814 and article I, section 11 do not require a compelling state interest, because they apply both neutrally and generally to all students eligible for Promise Scholarships. Neither the religion of the student, nor the student's motivation in seeking religious instruction, play any part in applicability of the statute.

The Ninth Circuit majority held that Wash. Rev. Code § 28B.10.814 is not neutral—even though it agreed that "Wash. Rev. Code § 28B.10.814 neither prohibits religious conduct nor does its application turn on the student's religious motivation". Pet. 14a. Despite this fact, the majority reasoned that the law lacked neutrality because the policy "excludes only those students who declare a major in theology that is taught from a religious perspective". Pet. 15a. In other words, students at a public or private university can receive a scholarship to study the secular subject of comparative religion, but Davey is disqualified from receiving a scholarship to pay for religious instruction in pursuing a theology degree.

The majority's analysis is flawed. What the majority dubs as a lack of neutrality is instead the perfectly permissible distinction between secular and

religious instruction. The Court has consistently relied on this distinction in addressing the "internal tension in the First Amendment between the Establishment Clause and Free Exercise Clause". *Norwood v. Harrison*, 413 U.S. 455, 469 (1973). Thus, in *Norwood*, the Court explained that this tension does not mean "a State is constitutionally obligated to provide even 'neutral' services to sectarian schools". *Norwood*, 413 U.S. at 469. On the other hand, while not required, a state can provide secular assistance to religious schools because

> "the transcendent value of free religious exercise in our constitutional scheme leaves room for 'play in the joints' *to the extent of cautiously delineated secular governmental assistance to religious schools,* despite the fact that such assistance touches on the conflicting values of the Establishment Clause by indirectly benefiting the religious schools and their sponsors". *Id.* at 469 (emphasis added).

Distinguishing between secular and religious instruction serves the purpose of avoiding the official advancement of religion, not the impermissible object of suppression of religion. For example, decisions forbidding religious instruction in public schools have distinguished between secular use and religious use. In *McCollum v. Board of Education*, 333 U.S. 203 (1948), the Court struck down a plan to provide religious instruction during school hours, but recognized the importance of teaching the secular

subject of religion. *McCollum*, 333 U.S. at 236 (Jackson, J., concurring) ("The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity–both Catholic and Protestant–and other faiths accepted by a large part of the world's peoples. One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared."). In *School District of Abbington Township v. Schempp*, 374 U.S. 203 (1963), the Court refused to permit schools to begin each day with a reading from the Bible. However, the Court went on to explain: "Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a *secular program of education*, may not be effected consistently with the First Amendment." *Id.* at 225 (emphasis added). In *Stone v. Graham*, 449 U.S. 39 (1980), the Court prohibited posting the Ten Commandments on the wall of each classroom. The Court observed that this "is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like". *Id.* at 42. Washington's approach to this divide is completely consistent. *See Calvary Bible Presbyterian Church v. Bd. of Regents*, 72 Wash. 2d 912, 436 P.2d 189 (1967), *cert. denied*, 393 U.S. 960 (1968).

The Court's decisions regarding public assistance to religious schools have also followed the distinction between secular and religious assistance. In *Board of Education v. Allen*, 392 U.S. 236 (1968), the Court approved lending textbooks to students of religious schools. The Court recognized that the assistance was limited to secular assistance. *Id.* at 244-45 ("each book loaned must be approved by the public school authorities; only secular books may receive approval"). In *Agostini v. Felton*, 521 U.S. 203 (1977), the Court approved using public school teachers in religious schools to provide remedial education. The Court emphasized the secular nature of the assistance. Under the rules, the teachers "could not introduce any religious matter into their teaching or become involved in any way with the religious activities of the private schools". *Id.* at 211. Most recently, in *Mitchell v. Helms*, 530 U.S. 793 (2000), the Court upheld a program to distribute federal funds to state agencies which, in turn, lend educational materials and equipment to public and private schools, including religious schools. The Court emphasized the secular nature of the assistance. *Id.* at 802 (plurality opinion) ("Most significantly, the 'services, materials, and equipment' provided to private schools must be 'secular, neutral, and nonideological.'").[10]

[10] In a different context, the Court approved the inclusion of a crèche in a holiday display because of the secular purpose. *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring) ("The evident purpose of including the crèche in the larger display was not promotion of the religious content of the crèche but celebration of the public holiday through its traditional symbols. Celebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose.").

Washington provides all manner of instruction in its public universities and colleges—including the secular subject of comparative religion. But the Washington Constitution forbids using public funds for religious instruction that inculcates religious belief (or disbelief). The state's aid to students attending private colleges and universities also makes this distinction. The distinction drawn by Washington is the same distinction that this Court has drawn between secular and religious instruction. Of course, in *Witters* II, this Court held that aid to a student to study theology did not violate the Establishment Clause because the aid "is paid directly to the student, who transmits it to the educational institution of his or her choice". *Witters* II, 474 U.S. at 488. As a result, any aid "that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients". *Id.* The fact that the Washington Supreme Court drew a different line in *Witters* III, 112 Wash. 2d 363, 771 P.2d 1119, does not invalidate the validity of the distinction between secular and religious instruction. For both federal and state constitutional purposes, the objective is the same (and is not discriminatory): to avoid providing official support through the levy of taxes to religious activities.

In sum, Washington's decision not to fund Davey's theology degree does not violate the

Free Exercise Clause. It does not burden Davey's right of free exercise of religion. Moreover, the prohibition does not discriminate against religion, because it follows the neutral line between secular and religious instruction.

3. The Promise Scholarship Does Not Establish A Public Forum

This case is controlled by the principle that the government's decision not to subsidize the exercise of a fundamental right does not infringe that right. The Ninth Circuit majority refused to apply this principle, in part, because it concluded that the Promise Scholarship program was a limited public forum that must be administered on a viewpoint neutral basis under *Rosenberger v. Rector & Visitors*, 515 U.S. 819 (1995). The majority concluded that it was not viewpoint neutral because it excludes only those who pursue the study of theology from a religious perspective. Pet. 12a.

The majority's analysis is mistaken. *Rosenberger* does not apply, because the Promise Scholarship program does not constitute a public forum. It is certainly true that some government subsidies create public forums. The university's payment of the cost of printing the publications of student groups in *Rosenberger* constituted a limited forum. But not every government subsidy creates a public forum. For example, in *Finley*, the Court refused to apply *Rosenberger* because grants to artists by the National Endowment For The Arts did not constitute a public forum. *Nat'l*

Endowment For The Arts v. Finley, 524 U.S. 569, 586 (1998) (*Rosenberger* does not apply because in "arts funding, in contrast to many other subsidies, the Government does not indiscriminately 'encourage a diversity of views from private speakers'"); *id.* at 599 (Scalia, J., joined by Thomas, J., concurring in the judgment) ("*Rosenberger* . . . found the viewpoint discrimination unconstitutional . . . because the government had established a limited public forum—to which the NEA's granting of highly selective (if not highly discriminating) awards bears no resemblance.").

Thus, when the government provides a subsidy, at "the outset . . . it is instructive to ask whether public forum principles apply to the case at all". *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 672 (1998). A limited or designated public forum like the one in *Rosenberger* "may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects". *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). The key is that the purpose of the forum is for speech. So, in *Rosenberger*, the university "expend[ed] funds to encourage a diversity of views from private speakers". *Rosenberger*, 515 U.S. at 834.

Unlike *Rosenberger*, the purpose of the Promise Scholarship program is not to encourage a diversity of views from private speakers. The purpose, according to the Washington Legislature,

was "to strengthen the link between post-secondary education and K-12 education", finding that "increasingly, an individual's economic viability is contingent on postsecondary educational opportunities". Wash. Rev. Code § 28B.119.005, Pet. 92a. The Washington Legislature sought to make such economic benefits available to low and middle income students who work hard and successfully complete high school with high grades. Wash. Rev. Code § 28B.119.005, Pet. 92a.

The Ninth Circuit majority undertook no close inspection of the Promise Scholarship when analogizing this case to *Rosenberger*. Instead, the majority held that "funding students' *education* . . . is not much different" from the extracurricular *speech* program at issue in *Rosenberger*. Pet. 20a. *United States v. American Library Association*, 123 S. Ct. 2297 (2003), rejected a similar argument. In *American Library Association*, the federal government provided grants to libraries to facilitate their access to the Internet. One condition of the grant was that the library install filters on their computers to prevent minors from gaining access to pornographic material. Like the Ninth Circuit majority, the plaintiffs in *American Library Association* argued that the government had created a designated public forum. The Court rejected this argument because a "public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to

speak". *American Library Ass'n*, 123 S. Ct. at 2305 (plurality opinion). The reason a library provides internet access is not to "encourage a diversity of views from private speakers, but for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality". *Id.* (citation omitted). Similarly, the purpose of the Promise Scholarship is not to encourage a diversity of views. The purpose is to help low and middle income students reap the economic benefits of a college education.

Rosenberger does not apply here because the Promise Scholarship is not a public forum. Moreover, the majority's application of forum analysis to programs that do not encourage speech is especially problematic if applied to programs involving the intersection of the Establishment Clause and the Free Exercise Clause.

For example, in *Mitchell*, the Court rejected a challenge under the Establishment Clause to a program that authorized funds "for the acquisition and use of instructional and educational materials, including library services and materials (including media materials), assessments, reference materials, computer software and hardware for instructional use, and other curricular materials". *Mitchell*, 530 U.S. at 802. The program was available to public and private schools, including religious schools. Presumably, the Ninth Circuit majority would find this to be a public forum under *Rosenberger* since, in its view, funding student publications is not much different than funding students' education. Pet. 20a.

The problem is that, under the majority's analysis, the program approved by the Court in *Mitchell* would fail under *Rosenberger*. The Ninth Circuit majority concluded that the Promise Scholarship was not viewpoint neutral "because state policy excludes only those recipients who pursue the study of theology from a religious perspective". Pet. 12a. But the program approved in *Mitchell* does precisely the same thing. The aid could not be used to finance religious indoctrination. *Mitchell*, 530 U.S. at 840 (O'Connor, J., joined by Breyer, J., concurring in the judgment) ("I also disagree with the plurality's conclusion that actual diversion of government aid to religious indoctrination is consistent with the Establishment Clause."); *id.* at 890 (Souter, J., joined by Stevens, J., and Ginsburg, J., dissenting) ("we have long held government aid invalid when circumstances would allow its diversion to religious education"). Thus, a religious school could not take advantage of the assistance if it intended to use the aid for the purpose of religious instruction. Under the majority's analysis, this would constitute viewpoint discrimination under *Rosenberger*.[11]

---

[11] The Ninth Circuit also went astray in assuming that, because the *Velazquez* Court found the forum cases instructive in a case involving the subsidy of speech activities, forum analysis properly applies to every government subsidy. Pet. 20a-21a. This ignores the entire function of forum analysis: weighing limitations on *speech* activities. *See Cornelius*, 473 U.S. at 800. *American Library Association* refutes this suggested extension of *Velazquez*. *See American Library Ass'n*, 123 S. Ct. at 2309 n.7.

The answer, of course, is that the program at issue in *Mitchell* does not constitute a public forum. What the majority considers viewpoint discrimination is, in reality, the distinction between secular and religious instruction that reflects the purposes of the Establishment Clause. The same thing is true of the Promise Scholarship program.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Ninth Circuit should be reversed.

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IN THE

Supreme Court of the United States

GARY LOCKE,
GOVERNOR OF THE STATE OF WASHINGTON, *ET AL.*,

Petitioners,

v.

JOSHUA DAVEY,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

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58 pp

QUESTION PRESENTED

Where a State chooses to award scholarships based on neutral criteria to financially needy, academically gifted students, does the State violate the First and Fourteenth Amendments to the U.S. Constitution when it discriminatorily strips the scholarship from an otherwise eligible student for the sole reason that the student declares a major in theology taught from a religious perspective?

PARTIES

The parties are identified correctly in the Petition, Pet. at ii, as clarified in the Brief in Opposition, Opp. at ii.

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ABBREVIATIONS KEY

ER	Excerpts of Record (9th Cir.)
JA	Joint Appendix
Opp.	Brief in Opposition
Pet.	Petition for Writ of Certiorari
Pet. App.	Appendix to the Petition
Pet. Br.	Brief for the Petitioners
SER	Supplemental Excerpts of Record (9th Cir.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the U.S. Constitution provide as follows:

First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

Fourteenth Amendment, section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

The pertinent provisions of the Washington state constitution and state statutes and regulations are set forth in the Brief for Petitioners, the Petition, and the Joint Appendix. *See* Pet. Br. at 1-2; Pet. App. 88a-106a; JA 178-87.

INTRODUCTION

The State of Washington awarded respondent Joshua Davey a Promise Scholarship based on financial need and academic achievement. The state permits Promise Scholars to use this scholarship to defray educational expenses -- including room and board -- for the first two years of *any* course of study at *any* accredited college in Washington *except* if the recipient declares a major in theology taught from a religious perspective. When Davey declared a double major in Pastoral Ministries and Business Management and Administration, state law disqualified him from receipt of his Promise Scholarship.

The Ninth Circuit in this case correctly held that this explicitly anti-religious, viewpoint-based discrimination violates the Free Exercise Clause of the First Amendment (as incorporated through the Fourteenth Amendment) to the U.S. Constitution, and that no state constitutional provision or statute justifies that federal constitutional violation. This Court should affirm that judgment.

STATEMENT OF THE CASE

1. Statement of Facts

The essential facts of this case are undisputed. JA 76; Pet. App. 52a.

a. The Promise Scholarship Program

In 1999, the State of Washington created the Promise Scholarship program designed to assist financially needy, academically gifted high school graduates who attend college in Washington. Pet. Br. at 6-7; JA 50-51, 180. As defendant Governor Gary Locke explained, Promise Scholarships are designed to "help ease the financial burden" of "the costs associated with college," JA 55.

Students who win Promise Scholarships may use them at "any

accredited institution within the borders of the state." Wash. Admin. Code [WAC] 250-80-010 (JA 178). This includes both state schools and accredited private colleges and universities. WAC 250-80-020(13) (JA 180-81). For students attending private institutions, the Promise Scholarship award is made payable to the student, WAC 250-80-060(4) (JA 184), not to the school, JA 58. The award check or "warrant" is sent to the student's college solely for verification of enrollment and for disbursement to the student. JA 55, 58, 184. The student may then use the scholarship funds for any "college-related expenses, including but not limited to, tuition, room and board, books, materials, and transportation." 1999 Wash. Laws ch. 309, § 611(6)(i)(vii) (Ex. 4 to Aff. of Michael J. Shinn in Support of Defendants' Motion for Summary Judgment) (ER[1] 38, p. 52) (legislative appropriation establishing Promise Scholarship program). *Accord* JA 7 (¶ 22) (Verified Complaint), 27 (¶ 22) (Answer). *See also* Wash. Rev. Code § 28B.119.010(7) (Pet. App. 94a) (statutory adoption of rule).

The Promise Scholarships were worth $1,125 for the 1999-2000 academic year, JA 55, 76, and $1,542 for the 2000-01 academic year, JA 95, 175. A Promise Scholarship is only available for the first two years of a student's college education. WAC 250-80-010 (JA 178), 250-80-070(1), (4) (JA 185).

b. Joshua Davey as Promise Scholar

Respondent Joshua Davey is a Christian committed, in his words, to "living out my faith in every aspect of my life." JA 40.

> I believe that the Bible teaches that all Christians are to serve God throughout their lives. For me, this means expressing my faith through full-time service in the ministry. Because of this religious belief, I have planned for many years to attend

[1] "ER" refers to the Excerpts of Record in the Ninth Circuit.

> a Bible college and to prepare myself through that college training for a lifetime of ministry, specifically as a church pastor. My religious beliefs are the only reason for me to seek a college degree.

Id.

Davey attended University High School in Spokane, Washington, and graduated in the top ten percent of his class. JA 41. His family's income, meanwhile, was below 135% of the median income level. *Id.* Davey therefore satisfied the academic and financial requirements of the Promise Scholarship, and he timely applied for that scholarship for use beginning with the 1999-2000 academic year. JA 8 (¶ 24), 27 (¶ 24); Pet. Br. at 9. The state, in letters of congratulations, subsequently notified Davey of his eligibility to receive the Promise Scholarship. JA 53-56.

Davey enrolled at Northwest College, a private, four-year college in Kirkland, Washington. JA 41. Northwest College is an eligible institution under the Promise Scholarship program. Pet. Br. at 9; JA 130; SER[2] 49 at 1, 3 (Decl. of Becki Collins with attached list of eligible institutions). Northwest is affiliated with the Assemblies of God. JA 42; ER 12, p. 13. "The mission of Northwest College is to provide, in a distinctly evangelical Christian environment, quality education to prepare students for service and leadership." ER 38, p. 47. Northwest College's concept of education is "distinctively Christian," *id.*; the faculty at Northwest does, however, "make it a point to express opposing points of view to deal with those questions that . . . others hold different views on." JA 107.

Davey chose to enroll at Northwest for four reasons: (1) it "offered a course of study that would allow me to fulfill my religious convictions regarding becoming a minister," JA 41;

[2]"SER" refers to the Supplemental Excerpts of Record in the Ninth Circuit.

(2) its cost was very reasonable, *id.*; (3) it was "relatively close to my hometown," JA 42; and, (4) its denominational affiliation (Assemblies of God) and tenets are "very similar" to Davey's (Foursquare Denomination), *id.* In particular, Davey noted, "one of things that attracted me to Northwest [was] the opportunity to study our world and our society from the viewpoint of a Biblical worldview." JA 43.

At Northwest College, students generally declare their intended majors upon enrollment. JA 152 (estimating only 15% enroll undeclared). Davey declared a double major in Pastoral Ministries and Business Management/Administration. JA 43. As Davey explained,

> I believed that this combination of courses would best prepare me for the complex management and spiritual tasks that comprise contemporary Christian ministry. Under this double major, I have studied or will study courses in a multitude of disciplines: humanities, science, mathematics, social science, business, finance, computer applications, religion, Biblical studies, and pastoral ministry.

JA 43.

c. The State's Disqualification of Davey

In October of 1999, Davey met with Northwest's financial aid officer, Lana Walter. JA 45. Ms. Walter informed Davey that, under state law and policy, "if he pursued a degree in theology" -- i.e., in Pastoral Ministries -- "the Scholarship would not be available to him." JA 77.

Davey was deeply dismayed:

> I felt that I was a second-class citizen in the eyes of the state. Somehow, apparently because my religious beliefs require me to pursue a degree in Pastoral Ministries and to eventually become a minister, my academic achievements were no longer worthy of official recognition, nor were my future

contributions to the state of Washington worthy of honor.

JA 46. Moreover, as Davey explained,

> [t]his unexpected, official demand to change my major or lose my funding confronted me with a serious dilemma: Should I change my religious beliefs that required me to study for the ministry? Worse, should I violate my religious belief regarding truthfulness by changing my course of study to a state-approved major, with the intent of switching back to the forbidden major once I had exhausted my Scholarship eligibility? Either way . . . I would have denied what I believed to be God's direction for my life, and would have had to violate my sincerely held religious beliefs.

Id. After "much pondering and prayer," *id.*, Davey "adhered to his decision to pursue his chosen career. As a result, no scholarship funds have been released to him." JA 77.

d. The Scope of the States' Disqualification of Theology Majors

The state's disqualification of theology majors may be encapsulated in the following summary, the details of which are set forth immediately below, *infra* pp. 7-11. Washington disqualifies from the Promise Scholarship those who *declare* a major in *theology* if that major is *taught from a religious viewpoint*. Those students who declare a major in theology taught from a *secular* perspective may keep their Promise Scholarships. Likewise, students who have *not declared* a major, or who have declared a major other than theology, may keep their Promise Scholarship while taking the *very same courseload* as a student who is disqualified for having declared a theology major. Furthermore, the state's disqualification applies even if the student declaring a theology major would use the scholarship funds exclusively for food, housing, transportation, or other "secular" expenses; students with

nontheology or undeclared majors, by contrast, may use Promise Scholarship funds even for the purchase of theology courses taught from a religious point of view.

Nothing in the appropriations legislation originally establishing the Promise Scholarship identified the pursuit of any particular major as a factor that would disqualify a student from receipt of the scholarship. JA 61 ("the Appropriations Bill creating this program is silent on this issue"); ER 38, pp. 51-52 (text of appropriations legislation). Indeed, the state has repeatedly touted the Promise Scholarship as broadly available to gifted but financially limited students. *E.g.*, JA 56 ("a quality education places *all of us* on a more level playing field") (emphasis added); ER 41, p. 52 (Governor's press release for event recognizing Promise Scholars) ("I believe that *every* student who shows promise should have the right to pursue the American Dream of a college education," Locke said. "'It's my dream that some day, *no* high-achieving student will be blocked from pursuing a higher education because of financial burdens") (emphasis added); *id.*, pp. 53-54, 56-59 (same).

However, a separate statute -- Wash. Rev. Code § 28B.10.814 -- expressly disallows all state aid "to any student who is pursuing a degree in theology." Pet. App. 92a. More recently, the statutory codification of the Promise Scholarship program adopted the same prohibition: "The scholarships may not be awarded to any student who is pursuing a degree in theology." Wash. Rev. Code § 28B.119.010(8) (Pet. App. 95a). The Promise Scholarship regulations likewise impose upon each student the qualification that, to be eligible to receive the scholarship, the student must "not [be] pursuing a degree in theology." WAC 250-80-020(12)(g) (JA 180).

The state requires participating institutions to certify that Promise Scholars are not "pursuing a degree in theology." JA 62; JA 60 (text of certification). The task of identifying what qualifies as "pursuing a degree in theology" is left to the

participating institutions. JA 126, 129-31, 137-39. Ultimate responsibility for determining whether a student is eligible to receive a Promise Scholarship, however, belongs to the Higher Education Coordinating Board (HECB) of the state. WAC 250-80-100(1)(b) (JA 186). (The HECB is in charge of administering the Promise Scholarship program. WAC 250-80-100(1) (JA 186).)

The statutory and administrative prohibition on "pursuing a degree in theology" does not bar *all* pursuit of a degree in religion or theology. Rather, a declared major in theology disqualifies a student from receipt of a Promise Scholarship *only* when the subject is taught from a perspective that is "devotional in nature or designed to induce religious faith," Pet. Br. at 6. Indeed, the state itself, through its own institutions of higher learning, teaches theology. *E.g.*, JA 66-74; ER 21, pp. 3-12 (course listings); ER 41, pp. 60-83 (selected syllabi). According to the state, a Promise Scholar may pursue a degree that entails the study[3] of "prayer, Messianism" (Relig. 210), "Quranic content" and "Muslim . . . religious thought" (Relig. 211), interpretation of the Old Testament (Relig. 405) and the New Testament (Relig. 220), "Buddhism as a religious way and as a way of thinking" (Relig. 354), "theological responses to the Holocaust" (Relig. 415), "Modern Christian Theology" (Relig. 428), "Christian Theology" (Relig. 528), "Islamic Theology" (Near East. 522), and the "Philosophy of Religion" -- including "the existence of God; the problem of evil; atheism; faith; religious experience and revelation; the attributes of God; miracles; immortality; and the relation between religion and morality" (Phil. 467) -- so long as the subject is taught from a "secular" point of view. Pet. Br. at 6. *See* JA 84 (professor describing religion courses at University of Washington) ("None

[3]The following courses are all listed in JA 67-72 except for the last three, which appear at ER 21, pp. 6 (Relig. 528), 9 (Near East. 522), 11 (Phil. 467).

of our courses are devotional in nature or designed to induce religious faith. The reality is quite the contrary . . ."): *id.* at 85 ("We have since taught about religions from a historical and strictly scholarly point of view").

That the religious *viewpoint* of the theology instruction is decisive is undisputed in this litigation. *See* Defts' Resp. Opposing Plaintiff's Motion for a Prelim. Injunc. at 14 n.5 (W.D. Wash. Mar. 6, 2000) (the statutory bar on pursuit of a theology degree in Wash. Rev. Code § 28B.10.814, "as guided by the extensive case law interpreting article 1 section 11 of the [Washington] constitution, shows that financial aid is unavailable to those pursuing religious instruction that is devotional in nature"); Defts' Mem. of Authorities in Support of Motion for Summary Judgment at 8 (W.D. Wash. July 24, 2000) ("Mr. Davey's courses are taught from the point of view that the Bible provides a 'blueprint' for how particular subjects should be understood by the students. (Davey Dep., p. 41:2-6 [JA 106]). This is precisely the type of indoctrination [sic] in specific beliefs of Christianity that is addressed by article I, section 11"); *id.* at 3 (no dispute that the ban on "pursuing a degree in theology" in § 28B.10.814 applies: "Northwest College educates students from a 'uniquely Christian point of view.' (Walter Dep., pp. 99:11-100:13 [JA 168-69] & Ex. 3 [ER 38, pp. 47-50: Northwest College Mission statement]). Mr. Davey's coursework toward his Pastoral Ministries major is taught from a viewpoint that the Bible represents 'truth,' and is 'foundational,' as opposed to a purely academic study of the Bible. (Davey Dep., p. 55:8-24 [JA 110]); Defendants/Appellees' Br. at 4 (9th Cir. Jan. 19, 2001) (same); Appellees' Pet. for Reh'g and Pet. for Reh'g En Banc at 5 (9th Cir. July 30, 2002) (same); Defendants/Appellees' Br. at 4 ("Theology courses at public institutions of higher education in Washington state, on the other hand, are taught from a strictly historical and scholarly point of view"); Pet. at 5 ("Northwest

. . . educates its students from a distinctly Christian point of view"); Pet. Br. at 10 ("The courses Davey would take in his Pastoral Studies major teach the Bible as truth, whereas a purely academic understanding would not necessarily subscribe to the Bible as ultimate truth").

Thus, Joshua Davey could use his Promise Scholarship to pursue a degree in theology at a public or private college, so long as that major was taught from any viewpoint other than a religious viewpoint. The state disqualified Davey from receipt of the Promise Scholarship solely because he announced his decision to pursue a theology degree taught from a *religious viewpoint*. Pet. App. 12a, 15a, 22a, 30a.

The ban on Promise Scholars pursuing a degree in theology is limited to *declared* theology majors. A student who simply declines to declare a major for the first two years of college is eligible to receive a Promise Scholarship. JA 161-62.[4] Likewise, a student who declares a major other than theology is eligible for the scholarship. JA 149, 156, 158.

As the state concedes, students with no declared major, or with a declared major other than theology, may receive a Promise Scholarship even if they take the very same courses as a declared theology major, including courses on theology that are taught from a religious viewpoint. Pet. at 17 ("Since Northwest is an eligible institution, Davey could attend Northwest -- using his scholarship -- and be exposed to that Christian point of view. The only thing he cannot do is use the scholarship to pursue a degree in theology"). In fact, Northwest College requires *all* students, regardless of major, to take

[4]The state relied upon this fact in its answer, objecting that the whole court case was Davey's fault because he could have simply declined to declare his major. JA 38 (¶ 7). (The state subsequently abandoned this legal argument. As noted above, the vast majority of students at Northwest declare their intended major upon enrollment. JA 152.)

religion courses. JA 151; ER 12, pp. 15-18, 20, 22-23.[5] These courses are taught from a Christian perspective, JA 168-69 -- indeed, they are designed to "cultivate a Christian worldview," ER 12, p. 16 -- but the state does not disqualify students attending Northwest from Promise Scholarships, so long as they do not declare a major in theology. JA 130 (Northwest is an eligible institution for Promise Scholars), 145 (fifteen Promise Scholars were attending Northwest in the 1999-2000 academic year).

The state's disqualification of theology majors from receiving Promise Scholarships is complete. That is, the restriction is not limited to *using* the scholarship funds for *religious* courses. As noted above, *non*theology majors are free to use their Promise Scholarships for any educational expense, including the tuition fees for theology courses. Declared theology majors, by contrast, may not even *receive* scholarship money, JA 61, 64, even if they would use the funds exclusively for food, housing, transportation, or tuition covering courses that fall outside the theology department. Moreover, if the student declares an eligible nontheology major -- as Davey did by declaring Business Management and Administration, JA 43 -- the addition of a theology major (as Davey did by declaring a double major) voids a student's eligibility to receive the scholarship, JA 155-56.

2. Course of Proceedings

Davey brought suit in federal district court seeking declaratory and injunctive relief, as well as damages, for the

[5]The four courses Northwest requires as part of its General College Requirements are "Exploring the Bible," "Principles of Spiritual Development," "Evangelism in the Christian Life," and "Christian Doctrine." ER 12, pp. 17, 18, 20, 22-23. Students face additional religious course requirements as part of their major. *E.g.*, ER 12, p. 19 (Biblical Studies Core for Psychology Major).

violation of his constitutional rights. JA 20-21. Davey alleged that the state's discriminatory disqualification of Davey from eligibility for receipt of the Promise Scholarship to which he was otherwise entitled, solely because he announced an intent to major in theology, was unconstitutional both facially (the categorical disqualification of theology majors) and as applied (to Davey). *Id.* Davey specifically alleged that the state's *de jure* discrimination against theology majors violated the Free Exercise (JA 11), Free Speech (JA 14), and Establishment (JA 13) Clauses of the First Amendment (as incorporated in the Fourteenth Amendment), and the Equal Protection Clause (JA 12) of the Fourteenth Amendment.[6]

The district court granted summary judgment for the state defendants, Pet. App. 51a; JA 170, and Davey appealed. Pending the ultimate outcome of the litigation, the state placed $1,542.00 -- the amount of the Promise Scholarship award which Davey would have received for his second year of study, JA 95 -- in a private escrow account. JA 175-77.[7]

The U.S. Court of Appeals for the Ninth Circuit reversed by a 2-1 vote. Pet. App. 1a.

The Ninth Circuit majority noted that the disqualification of

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[6]Davey also alleged violations of the Washington State Constitution. JA 17-20. Those claims are not before this Court.

[7]The state correctly notes that the state initially offered simply to "set aside . . . in its operating budget" the amount in question. Pet. Br. at 15. The ultimate agreement, however, instead required the state's purchase of a certificate of deposit, and provided a contractual agreement regarding the disposition of that CD. *See* JA 176-77. Under that agreement, the CD will be released to the party that ultimately prevails in this litigation. *Id.*

Importantly, the district court relied upon the set-aside of these funds in denying Davey's request for an injunction pending appeal. JA 173-74 (set-aside "virtually obviates the risk of irreparable harm" and thus "court accepts HECB's offer to set aside $1,542 during the pendency of Davey's appeal, which shall be paid to Davey upon court order in the event that he prevails on appeal").

theology majors "lacks neutrality on its face." *Id.* at 8a.

> The Promise Scholarship program is administered so as to disqualify only students who pursue a degree in theology from receiving its benefit; otherwise the Scholarship is available to all secondary school graduates who have high enough grades, low enough income, and attend an accredited college in the state. And the policy as applied excludes only those students who declare a major in theology that is taught from a religious perspective.

Id. at 14a-15a. The court distinguished cases involving neutral programs that only incidentally affect religion as "different from being directly disabled from participating in a government program on the basis of religion," *id.* at 23a. "As this classification facially discriminates on the basis of religion," the court ruled, "it must survive strict scrutiny." *Id.* at 8a.

> This is not a case where a person claims that denial of a financial benefit which is not available to others deprives him of his free exercise rights. Davey was denied a Promise Scholarship to which he was otherwise entitled solely because he personally chose to pursue a religious major. For this reason we must strictly scrutinize the restriction. *See McDaniel* [*v. Paty*], 435 U.S. [618,] 628 [(1978)]; [*Church of the*] *Lukumi* [*Babalu Aye v. City of Hialeah*], 508 U.S. [520,] 546 [(1993)].

Id. at 24a-25a.

Applying strict scrutiny, the court found no compelling interest that could justify the state's express discrimination against religion. The Ninth Circuit concluded that, as in *Widmar v. Vincent*, 454 U.S. 263, 276 (1981), "a state's broader prohibition on governmental establishment of religion is limited by the Free Exercise Clause of the federal constitution." Pet. App. 27a. Moreover, the court found especially unpersuasive

any asserted concern about state funding of religion.

> The Promise Scholarship is a secular program that rewards superior achievement by high school students who meet objective criteria. It is awarded to students; no state money goes directly to any sectarian school. Scholarship funds would not even go indirectly to sectarian schools or for non-secular study unless an individual recipient were to make the personal choice to major in a subject taught from a religious perspective, and then only to the extent that the proceeds are used for tuition and are somehow allocable to the religious major. *See Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (2002) (emphasizing importance of neutrality and individual choice in upholding voucher program). The proceeds (approximately $1,500 in Davey's [second] year) may be used for any education-related expense, including food and housing; application to religious instruction is remote at best. HECB does not argue otherwise. In these circumstances it is difficult to see how any reasonably objective observer could believe that the state was applying state funds to religious instruction or to support any religious establishment by allowing an otherwise qualified recipient to keep his Scholarship.

Pet. App. 29a-30a. Hence, the court ruled, the discriminatory state restriction on theology majors failed strict scrutiny and unconstitutionally violated Davey's Free Exercise rights. *Id.* at 30a-31a. The court below therefore did not need to reach Davey's other federal constitutional claims, *id.* at 31a, namely under the Free Speech, Establishment, and Equal Protection Clauses, *id.* at 7a.

Judge McKeown dissented. *Id.* at 31a.

The Ninth Circuit denied rehearing, Pet. App. 86a. This Court granted certiorari. *Locke v. Davey*, 123 S. Ct. 2075 (2003).

SUMMARY OF ARGUMENT

The state's express, discriminatory disqualification of otherwise eligible scholarship recipients, solely because they declare a major in theology taught from a religious point of view, violates the Free Exercise Clause of the First Amendment. *Infra* § I. *See Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993); *McDaniel v. Paty*, 435 U.S. 618 (1978). The state's discrimination against religious viewpoints is explicit and undisputed; hence, strict scrutiny applies. That Davey adhered to his religiously chosen course of study, despite the state's forfeiture of more than $2,500 in scholarship funds to which Davey was otherwise entitled, does not exonerate the state. State interference with the free exercise of religion need not *successfully* thwart private religious choices in order to be unconstitutional. The state proposes that Davey could have simultaneously attended two colleges, each part-time, and received the Promise Scholarship at one college while pursuing a theology degree at the other. But even assuming such an awkward and cumbersome option were available, the fact of discrimination remains: the state forces *only* theology majors to undertake such convoluted measures.

Applying strict scrutiny, the challenged restriction fails both for want of a compelling interest and for lack of narrow tailoring. The state's interest in enforcing what it claims are more strictly separationist requirements in its state constitution cannot trump federal constitutional rights. Moreover, the connection between the disqualification of declared theology majors and the state's proffered concern over official support for religious instruction is so attenuated and riddled with inconsistencies as to refute any claim of narrow tailoring.

The state's express discrimination against those who declare a major in theology only when taught from a religious viewpoint also runs afoul of the Free Speech Clause. *Infra* § II. *See*

Rosenberger v. Rectors and Visitors of Univ. of Va., 515 U.S. 819 (1995). Discrimination against the religious viewpoint of private speakers is unconstitutional regardless of how one characterizes the forum at issue. Here, the state does not even invoke a countervailing Establishment Clause claim, as in *Rosenberger*. Because the choice of a college major and the viewpoint of the instruction provided at private institutions represent genuinely private expression, neither the cases involving *government speech*, nor the cases involving *government instruction*, can exonerate the state's discrimination against religious viewpoints in the present case.

The state's plea that it is simply declining to fund the exercise of a right is unavailing. *Infra* § III(A). Here the state *does* fund the pursuit of education at private institutions, including the pursuit of a major in the *subject* of religion. The constitutional defect arises from the state's imposition of an invidious *viewpoint*-based disqualifier upon otherwise eligible private educational pursuits. The state's invocation of the doctrine of unconstitutional conditions, meanwhile, leads to the same conclusion. *Infra* § III(B). Here, the state penalizes the exercise of personal religious choices with the forfeiture of over $2,500 worth of state scholarship funds to which the recipient would otherwise be entitled.

Because the state's anti-religious discrimination embodies hostility, not neutrality, toward religion, and because a disqualification tied to private *religious* choices yields impermissible state entanglement with religion, the challenged restriction also violates the Establishment Clause of the First Amendment. *Infra* § IV.

Finally, the state's express, intentional discrimination against those persons who choose to pursue a theology degree taught from a religious perspective fails both strict scrutiny and rational basis review under the Equal Protection Clause of the Fourteenth Amendment. *Infra* § V.

This Court should affirm the judgment of the Ninth Circuit holding the state's express, anti-religious discrimination in this case to be unconstitutional.

ARGUMENT

The essential question is whether the state, having chosen to issue Promise Scholarships to economically needy, academically talented students attending accredited colleges, Pet. App. 8a-9a, can strip a scholarship from an otherwise eligible recipient, *id.* at 9a-10a, just because he announces his intention to "pursu[e] a degree in theology taught from a religious perspective," *id.* at 30a. This anti-religious, viewpoint-based discrimination clearly offends the First and Fourteenth Amendments to the U.S. Constitution.

Petitioners have conceded that respondent Davey faces discrimination targeting a religious viewpoint. *Supra* pp. 8-10. The very premise of the state's exclusion of Davey from the Promise Scholarship program is that "Davey's coursework towards his Pastoral Ministries major was taught from a viewpoint that the Bible represents 'truth,' and is 'foundational,' as opposed to a purely academic study of the Bible." Appellees' Pet. for Reh'g and Pet. for Reh'g En Banc at 5 (9th Cir. July 30, 2002) (No. 00-35962). *Accord* Defendants/Appellees' Br. at 4, *Davey v. Locke*, No. 00-35962 (9th Cir. filed Jan. 18, 2001) (same); Pet. App. 9a-10a; *id.* at 12a ("state policy excludes only those [scholarship] recipients who pursue the study of theology from a religious perspective"); *id.* at 15a, 22a, 30a. This concession alone suffices to doom the restriction as offensive to Davey's constitutionally protected rights to free speech, free exercise of religion, equal protection, and freedom from religious establishments.

Notably, the State does *not* defend its anti-religious discrimination by invoking the federal Establishment Clause. Such a defense would in any event be meritless. *Witters v.*

Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986) (*Witters II*).

The Ninth Circuit held the state's express, anti-religious discrimination to be unconstitutional. This Court should affirm that judgment.

I. THE STATE'S DISCRIMINATORY DISQUALIFICATION OF THEOLOGY MAJORS VIOLATES THE FREE EXERCISE CLAUSE.

The state concedes that there is "no question that [respondent Joshua] Davey has a constitutional right to practice his religion, including pursuing a degree in theology." Pet. Br. at 23. *See also id.* at 24 (same); *Employment Division v. Smith*, 494 U.S. 872, 877 (1990) ("the 'exercise of religion' often involves . . . the performance of . . . acts"). The undisputed record likewise demonstrates that Davey's decision to attend Northwest College, and to double-major in Pastoral Ministries and Business Management/Administration, reflected deeply religious personal choices and represented Davey's effort to live out his religious beliefs. JA 40 (¶ 4), 41-42 (¶ 9), 43 (¶¶ 14-15), 46 (¶¶ 26-28), 101, 103, 114. *See also supra* pp. 3-5.

By expressly singling out for special disabilities only those students, like Joshua Davey, who are pursuing theology degrees taught from a religious viewpoint, the state has committed a textbook violation of the Free Exercise Clause of the First Amendment.

A. Washington Has Created a Religious Gerrymander.

"At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993). Government

may not "impose special disabilities on the basis of religious views or religious status," *Smith*, 494 U.S. at 877. *Accord McDaniel v. Paty*, 435 U.S. 618 (1978). Thus, "the minimum requirement of neutrality is that a law not discriminate on its face." *Lukumi*, 508 U.S. at 533.

1. The religious discrimination is explicit.

In the present case, Washington has doubly offended this basic requirement of the Free Exercise Clause. First, the statute and regulations at issue expressly target, for special disabilities, the pursuit of a religious major. Pet. App. 92a (Wash. Rev. Code § 28B.10.814) (disqualifying "any student who is pursuing a degree in theology"); JA 180 (WAC 250-80-020(12)(g)) (disqualifying students "pursuing a degree in theology"). No student pursuing "a degree in theology" may receive a Promise Scholarship (or any other state student financial aid, Pet. App. 92a). Second, compounding this express discrimination, Washington applies its restriction only to the pursuit of a theology major *taught from a religious perspective*. *Supra* pp. 8-10. This is *par excellence* a "religious gerrymander," *Lukumi*, 508 U.S. at 535. The state's reliance upon the constitutional rules governing "neutral and uniform" laws that only "indirectly and incidentally" burden religious choices, Pet. Br. at 34; *see generally id.* at 33-36, are thus wholly inapposite.

The present case represents that "extreme" situation "in which a State directly targets a religious practice," *Smith*, 494 U.S. at 894 (O'Connor, J. concurring in judgment). *See Lukumi*, 508 U.S. at 577-78, 580 (Blackmun, J., joined by O'Connor, J., concurring in judgment) (on "those rare occasions on which the government explicitly targets religion (or a particular religion) for disfavored treatment, as is done in this case," the "case is an easy one to decide"). Washington "imposes a unique disability upon those who exhibit a defined level of intensity of involvement in protected religious activity," *McDaniel*, 435 U.S.

at 632 (Brennan, J., concurring) -- i.e., Washington specially disqualifies otherwise eligible students from state financial aid when those students, in Davey's words, "take their faith so seriously that they want to serve their fellow believers and their society through their faith . . . including their choice of college and career," JA 46.

2. The state's profession of an innocent motive is irrelevant.

The state argues that it harbors no malice toward religion, and that the restrictions at issue were enacted for good motives. *E.g.*, Pet. Br. at 21. "But good intentions as to one valid objective do not serve to negate the State's involvement in violation of a constitutional duty." *Norwood v. Harrison*, 413 U.S. 455, 466 (1973). The discriminatory restriction on clergy at issue in *McDaniel* purported to be admiring and solicitous of the religious duties of ministers, 435 U.S. at 621 n.1 (preamble to state constitutional restriction: "Whereas Ministers of the Gospel are by their profession, dedicated to God and the care of Souls, and ought not to be diverted from the great duties of their functions"); nevertheless, this Court unanimously held the restriction unconstitutional. *See also Lukumi*, 508 U.S. at 559 (Scalia, J., concurring) ("Nor, in my view, does it matter that a legislature consists entirely of the pure-hearted, if the law it enacts in fact singles out a religious practice for special burdens").[8]

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[8]This discrimination is even more evident in light of the invidious anti-Catholic bigotry of the Blaine Amendments, *see* Opp. at 16, a bigotry recognized in opinions joined by a majority of the members of this Court. *See Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion of Thomas, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.); *Zelman v. Simmons-Harris*, 536 U.S. 639, 720-21 (2002) (Breyer, J., joined by Stevens and Souter, JJ.). *Cf.* Brief of American Jewish Congress et al. at 26-30 (conceding taint of "raw anti-Catholicism" (at 26) but arguing that (continued...)

3. Davey's ability to overcome or circumvent the discrimination is irrelevant.

The state observes that denial of scholarship funds "did not prevent Davey from pursuing his Pastoral Studies major at Northwest." Pet. Br. at 12. *See also id.* at 24. This is true but entirely irrelevant. There is simply no precedent -- and the state cites none -- for the remarkable proposition that a restraint on free exercise must be successful in order to be unconstitutional. Throughout history, many courageous men and women have resisted threats and inducements from the state and instead adhered to the course their faith commanded. That these often heroic witnesses chose adherence to their faith despite pressure from the state does not imply that the government was not impairing their religious free exercise. And while the state in this case did not threaten Davey with torture or death, *cf.*, *e.g.*, 2 Maccabees 6:18-31, 7:1-42. it did require his forfeiture of a total of $2,667.00 in state aid ($1,125 for the first year, JA 55, and $1,542 for the second year, JA 95) as the price of adherence to his religious convictions. No rule of constitutional law creates an exemption for invidious state discrimination against religion when it is "unsuccessful" or "not extremely burdensome." Davey faced "an attempted coercion" to act contrary to his beliefs. JA 121. He "was given a choice to either fully exercise my faith or receive a government benefit for which I qualified," JA 47. The state's coercion need not prevail over individual

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[8](...continued)
fear of Catholicism was a "legitimate" (at 27) response to "infamous" (at 28) Catholic teachings). *See also* Brief of Historians and Law Scholars at 18 ("it is indisputable that anti-Catholic animus motivated many supporters of the [Blaine] amendment and colored the debates surrounding its near enactment"); *id.* at 2, 14, 17, 23, 25 (conceding anti-Catholic taint).

conscience to be unconstitutional.[9]

The state nevertheless repeatedly insists that it "does not burden" Davey's free exercise. *E.g.*, Pet. Br. at 38. But the forfeiture of $2,667 in response to the making of a private religious choice is unquestionably a burden on religion. Moreover, where the state treats religion in an expressly discriminatory and unfavorable manner, as here, that is in itself a burden on religion. *McDaniel*, 435 U.S. at 635 n.8 (Brennan, J., concurring) ("establishing a religious classification as a basis for qualification" is "void without more"). Invidious discrimination is no less unconstitutional when applied to small matters (like segregated water fountains).

The state suggests that Davey might have split his college education between two institutions, used the Promise Scholarship at Northwest for a business degree, and gone elsewhere for his theology studies. Pet. Br. at 12, 20, 24-25, 38-39. But Davey's choice to attend Northwest, like his choice of a major, reflected the pursuit of his personal religious faith. JA 41-42. *See supra* pp. 4-5. Telling Davey to go to some other school for some or all of his college education is just another way of discriminating against an otherwise eligible student

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[9]The ACLU would confine Free Exercise safeguards to protection against criminal penalties and legal disabilities. Brief of American Civil Liberties Union et al. at 21-22. Of course, here Davey *does* face a legal disability, as his choice of a theology major barred him from receipt of a state scholarship to which he was otherwise entitled. But in any event, the ACLU's parsimonious view of the scope of Free Exercise rights is flat wrong. "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). *Accord Lukumi*, 508 U.S. at 557 (Scalia, J., concurring). For example, nothing in *Lukumi* suggests that if the city, instead of adopting a criminal prohibition, had merely imposed an excise tax, or a forfeiture of some financial benefit, for engaging in religious animal sacrifice, the result would have been any different. It was not the *severity* of the restriction, but its *discriminatory reach*, that rendered it unconstitutional. *Lukumi*, 508 U.S. at 524.

attending an otherwise eligible institution. *Cf. Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723 n.8 (1982) ("Without question," school's discriminatory policy "worked to [the student's] disadvantage," even though he "could have attended classes and received credits" in similar program at some other school); *Schneider v. State*, 308 U.S. 147, 163 (1930) ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place"). The state's protestations cannot negate the undisputed fact that, unlike all other Promise Scholars, Davey (or any other would-be theology major) was not allowed to pursue the degree of his choice while attending the college of his choice.

Notably, this argument about "college-splitting," albeit meritless, is absolutely essential to the state's position. The state concedes that "Davey has a right to practice his religion -- including pursuing a degree in theology," Pet. Br. at 24, and that "the government may not condition the receipt of a benefit on the relinquishment of a constitutional right," *id.* at 30. Thus, the state has conceded that the challenged restrictions are unconstitutional if they condition receipt of the Promise Scholarship upon the surrendering of the right to pursue a degree in theology -- which of course is precisely what the restrictions do. The state's only recourse is to deny that the restrictions *in fact* require a scholarship recipient to forego pursuit of a theology major, because, in theory, the option of attending two different colleges at once might enable a student to evade the restriction. But as pointed out above, only *theology* majors face this awkward and burdensome rigamarole. Moreover, the option of college-splitting ignores the fact that Davey chose an *institution* -- Northwest College -- not just a *degree*. *See* JA 41-42. The state offers no explanation why different rules should govern the permissibility of the state's discriminatorily interfering with the religiously motivated choice of a *major*

(which the state apparently concedes is unconstitutional), and state's discriminatorily interfering with the religiously motivated choice of a *college*.

B. Washington's Anti-religious Discrimination Fails Strict Scrutiny.

When "religious practice is being singled out for discriminatory treatment," *Lukumi*, 508 U.S. at 538, the challenged government restriction "must undergo the most rigorous of scrutiny," *id.* at 546. *See also id.* at 531. *Accord Smith*, 494 U.S. at 886 n.3 ("we strictly scrutinize governmental classifications based on religion").[10]

This Court has noted the demanding nature of strict scrutiny in this context. "A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." *Lukumi*, 508 U.S. at 546. It may well be that "[w]hen a law discriminates against religion as such, as . . . in this case, it automatically will fail strict scrutiny," *id.* at 579 (Blackmun, J., joined by O'Connor, J., concurring in judgment), "because a law that targets religious practice for disfavored treatment both burdens the free exercise

[10]Various amici supporting the state seek to evade strict scrutiny by invoking the notion of "play in the joints" between the Free Exercise and Establishment Clauses. *E.g.*, Brief of American Jewish Congress et al. (AJC) at 1-2. But the "play in the joints" concept reflects this Court's concern that an overly rigid reading of the Establishment Clause could impair "the transcendent value of free religious exercise in our constitutional scheme," *Norwood v. Harrison*, 413 U.S. at 469. To turn that concept into a license for the state to engage in express, anti-religious discrimination would be entirely to pervert that concept. Interestingly, the AJC brief appears to agree that, at least as applied to Joshua Davey, the challenged restriction is unconstitutional because "Davey was penalized for having an additional religious major, even though his secular major [business] alone would have sustained his eligibility for a grant." AJC Br. at 12 n.8.

of religion and, by definition, is not precisely tailored to a compelling government interest," *id.* *See also id.* at 563 (Souter, J., concurring) (embracing the "noncontroversial principle" that "formal neutrality" is a "necessary condition[] for free-exercise constitutionality").

Here, even if Washington's express anti-religious discrimination is not *ipso facto* unconstitutional, *see id.* at 579 (Blackmun, J., joined by O'Connor, J.) (law that is not neutral and "targets religion" for burdens "ipso facto, fails strict scrutiny"), the discrimination at issue plainly fails both requirements of strict scrutiny: no compelling interest justifies the restriction, and the restriction is not narrowly tailored to the state's asserted interests.

1. No compelling state interest justifies the state's anti-religious discrimination.

There is, of course, no legitimate state interest in discouraging or penalizing the study of religion, including study from a religious perspective. (Deterrence of the pursuit of theology degrees is the principal consequence of the restriction challenged here. JA 161-62.) The state understandably does not proffer any such interest. Instead, the state asserts an interest in "avoiding government funding of religious instruction," Pet. Br. at 21.[11] Whether this purposed state interest be understood as an effort to comply with the state constitution, *id.* at 31, or as an effort to protect objecting taxpayers, *id.* at 35, this interest cannot be

[11]The purpose of the Promise Scholarship program is "to help low and middle income students reap the economic benefits of a college education," Pet. Br. at 47. This purpose is religion-neutral and wholly compatible with grants to *all* students, regardless of majors. Pet. App. 21a-22a. The state does not claim that the purpose of the scholarship program itself somehow requires, or is in any way furthered by, the discriminatory disqualification of theology majors. To the contrary, such discrimination directly undercuts the program's goal of making a quality education available to "all of us," JA 56.

characterized, in the present context, as "compelling."

a. Compliance with state constitution

The state cannot legitimately claim a compelling interest, in the present context, in following the Washington state constitutional provisions separating church and state.

First of all, those state constitutional provisions may not even *require* the express anti-religious discrimination contained in the statutes and regulations at issue here. While in 1989 the state supreme court sustained such a view, *see Witters v. State Commission for the Blind*, 112 Wash. 2d 363, 771 P.2d 1119 (*Witters III*), *cert. denied*, 493 U.S. 850 (1989), there is every reason to believe that the state supreme court would no longer consider *Witters III* to reflect a correct interpretation of the Washington Constitution. *See* Opp. at 3-6.[12]

Moreover, even if *Witters* remains valid as a matter of *state* constitutional law, it remains the case that as a matter of *federal* constitutional supremacy, U.S. Const. art. VI, cl. 2, no state constitutional provisions may be used to trump federal constitutional rights: "the state interest asserted here -- in achieving greater separation of church and State that is already ensured under the Establishment Clause of the Federal Constitution -- is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well." *Widmar v. Vincent*, 454 U.S. 263, 276 (1981). *Accord PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980) (acknowledging state's

[12]Of course, regardless of whether the state *constitution* requires such discrimination, the pertinent state *statutes* and *regulations* do. *See* Wash. Rev. Code §§ 28B.10.814 (Pet. App. 92a), 28B.119.010(8) (Pet. App. 95a); WAC 250-80-020(12)(g) (JA 180). Hence, contrary to the suggestion of one amicus, there would be no point to certifying to the Washington Supreme Court "the question whether the challenged regulation is still required to comply with the Washington constitution," AJC Br. at 12 n.8, so long as the challenged statutes and regulations provide an independent source for the disqualification of theology majors.

"sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution," but noting that any restrictions imposed pursuant thereto must not "contravene any other federal constitutional provision"). Thus, as in *Widmar*, "[i]n this constitutional context, we are unable to recognize the State's interest as sufficiently 'compelling'" to justify discrimination against private religious choices. 454 U.S. at 276. As one of the state's amici concedes, "[t]he Free Exercise (and Equal Protection) Clauses do not become nullities because a state ensconces a restriction on its relations with religion in its constitution." AJC Br. at 15.

This is the only sensible rule. Federal constitutional rights do not expand or contract from state to state in response to state constitutional enactments on the matter. Were the contrary true, states could blunt the reach of federal constitutional rights by incorporating countervailing provisions into their state constitutions.[13] The U.S. Constitution would not set a national standard for federal rights, but instead would merely create a "default rule" that would prevail in the absence of contrary state constitutional provisions. The U.S. Constitution, however, is the "supreme law of the land . . . any thing in the *Constitution* or laws *of any state* to the contrary notwithstanding." U.S. Const., art. VI, cl. 2 (emphasis added).

b. Protection of taxpayer conscience

Nor can Washington assert a compelling state interest in protecting taxpayer conscience, i.e., preventing the use of tax money to support the study of religious views with which some

[13]For example, a state might adopt a provision guaranteeing "full civil remedies" for "all persons" against "outrageous defamatory communications," and then invoke that provision as a justification for not following the First Amendment holding in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

taxpayers may disagree.

At the outset, there is a great irony to the state's argument. This Court has held that *viewpoint neutrality* toward private speech provides the necessary protection of the conscience rights of those who object to funding certain activities. *Board of Regents v. Southworth*, 529 U.S. 217, 230 (2000). Yet here, Washington asserts the exact opposite: that the state must be *viewpoint-discriminatory* toward private religious speech to protect the conscience of its citizens. This contention is facially implausible.

In any event, Washington has shown, by its own actions, that it does not take this asserted interest seriously. Washington permits Promise Scholars to use scholarship funds to study theology, taught from a religious perspective, to their hearts' content -- so long as they either do not declare a major in their first two years or declare a major other than theology. *Supra* pp. 10-11. "It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547 (internal quotation marks, editing marks, and citations omitted). Moreover, Washington demonstrates no solicitude for those taxpayers who may object to the way religion or ultimate truth is addressed in coursework taught from nonreligious viewpoints. *See* JA 67-74. "Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling." *Lukumi*, 508 U.S. at 546-47.

Importantly, the Promise Scholarship funds students, not schools. Washington concedes that it "has no interest in preventing Davey from using his *own* funds to obtain a theology degree." Pet. Br. at 25 (emphasis added). But once the Promise

Scholarship funds are disbursed to a student, they *are* that student's own funds. *See* JA 7 (¶ 22), 27 (¶ 22), 184 (WAC 250-80-060(4)), 186 (WAC 250-80-100) (no provision for supervision of student's expenditures). Any connection between a tax dollar and a religious course is solely the result of the intervening, "genuinely independent and private" choice of the scholarship winner, and not the direction of the state. *Witters*, 474 U.S. at 487. The nexus between Promise Scholarships and religious study is thus comparable to -- and as attenuated as -- the nexus between a government employee's salary and that employee's donations to a church or synagogue. *Id.* at 486-87. There is thus no "official advancement of religion," Pet. Br. at 40, contrary to the state's contention. "[T]he fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State." *Witters*, 474 U.S. at 488. Such "attenuated" links between tax dollars and religious courses, *id.*, wholly dependent on contingent, intervening private choices, are not the stuff of compelling interests in protecting taxpayer consciences.[14]

Lacking any compelling interest to support it, the state's *de*

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[14]The state also raises an interest in avoiding "the establishment of an official religion," Pet. Br. at 35, but offers no explanation of how a neutral program of student financial aid could possibly jeopardize that interest. In addition, the state claims an interest in avoiding "the entanglement that accompanies the flow of public funds." *Id.* But the imposition of a religion-based category of exclusion "would risk greater entanglement," *Widmar v. Vincent*, 454 U.S. 263, 272 n.11 (1981), while a nondiscriminatory policy "would in fact *avoid* entanglement with religion," *Board of Educ. v. Mergens*, 496 U.S. 226, 248 (1990) (plurality) (emphasis in original), by removing religion as a factor in the state's administrative calculus. (The state tries to dodge this concern by delegating the definition and identification of "theology" to the private colleges, Pet. Br. at 8. While the state is to be commended for leaving religious decisions to private religious entities, the state has nevertheless created the problem by imposing a religious criterion of exclusion in the first place. *See also infra* note 22.)

jure anti-religious discrimination fails strict scrutiny.[15]

2. The anti-religious discrimination is not narrowly tailored to the asserted state interests.

The state's anti-religious restriction fails strict scrutiny for a second, independent reason, as well: the absence of narrow tailoring. *Lukumi*, 508 U.S. at 546 ("The absence of a narrow tailoring suffices to establish the invalidity of the [law]").

If the state interest is considered the avoidance of tax-supported education for those students pursuing religious vocations,[16] the obvious response is that the state has not prohibited any such thing. Prospective (or current) clergy *can* use Promise Scholarships to study, so long as they do not declare a major in theology taught from a religious perspective. A prospective priest, minister, or rabbi could use a Promise Scholarship to pursue a degree in Aramaic, Greek, or Hebrew, psychology or philosophy, history, counseling, ethics, business

[15]The ACLU postulates that the state has an interest in equalizing the *impact* of its programs on various religious denominations. ACLU Br. at 19-20. Thus, any program that might be of greater use to some, but not all, religious groups, according to the ACLU, presents an occasion for the state to disqualify *all* religious users to prevent *some* denominations from obtaining a relative advantage. *Id.* The state does not assert any such interest in leveling the religious marketplace. Nor is it the proper business of the state to impose handicaps on religious choices, as if trying to even out a bowling tournament or a horse race. For the state even to undertake efforts to balance out religions would raise serious entanglement concerns. The fact is that access to any particular government facility (e.g., parks, school buildings, municipal theaters) or program (e.g., scholarships, provision of aid to the poor) will be more realistic or appealing for adherents of some religions than to adherents of others. But that fact is a reflection of religious diversity, not a failure of government to neutralize religious variety.

[16]Such an asserted interest is itself constitutionally offensive as a status-based disability for clergy. *McDaniel v. Paty*, 435 U.S. 618 (1978).

administration, or any other "nontheology" major, at any accredited institution in Washington. That same future member of the clergy could take courses, including theology itself, steeped in a religious perspective, using a Promise Scholarship, so long as that person was not a declared theology major. And that same person could even major in theology, so long as it was not taught from the taboo religious perspective. Thus, the current restriction is very poorly linked to any objection to funding the training of clergy. On the other hand, Promise Scholars who are confirmed atheists, or who are solidly committed to a career in law, medicine, or some other employment aside from religious ministry, are nevertheless barred by Washington's restriction from majoring in theology if it happens to be taught from a religious viewpoint.

Washington may respond that its restriction is not tailored to the *student's* ministry plans, but rather to the use of state funds to obtain the religious message of the *teaching* itself. Pet. Br. at 43 ("religious instruction that inculcates religious belief (or disbelief)"). Leaving aside for a moment the obvious free speech flaws of this approach, *see infra* § II, such a response still fails to demonstrate narrow tailoring. As noted above, Promise Scholars can use state funds to study theology *taught from a religious perspective* so long as they have not declared a major in theology (which they need not do during the full two-year period the scholarship covers, JA 128).

If the state were genuinely concerned with the use of tax funds to purchase religious instruction, it would (insofar as it could) directly forbid the *use* of scholarship funds *for such courses*. "[A]ssistance properly confined to the secular functions of secular schools does not substantially promote the readily identifiable religious mission of those schools and it does not interfere with the free exercise rights of others." *Norwood v. Harrison*, 413 U.S. 455, 468 (1973). Instead, Washington *allows* nontheology majors to use scholarship funds to purchase

religious instruction, but *disallows* declared theology majors the use of scholarship funds even for food or rent or for secular courses like chemistry or physical education.[17] The state's eligibility restriction disqualifies a declared theology major from receiving the scholarship even if that student uses only personal funds to pay for the theology courses. As noted, Washington concedes that it "has no interest in preventing Davey from using his own funds to obtain a theology degree." Pet. Br. at 25. Yet even if he does so, the state penalizes him for declaring his intent to major in theology. Such simultaneous overbreadth and underinclusiveness refutes any claim of narrow tailoring. *Lukumi*, 508 U.S. at 546.

Finally, it must be emphasized that the state constitutional prohibition on the appropriation or application of public money "to any religious worship, exercise or instruction," Wash. Const. art. I, § 11 (Pet. App. 88a), *does not require the adoption of religion-discriminatory programs*. For example, Washington could confine the Promise Scholar program to its own state schools. Such a restriction would not entail any unconstitutional religious classifications, but would instead distinguish between public and private institutions. And, of course, Washington is not required to have the Promise Scholarship program in its current form at all; the legislature is free to restructure the program to achieve its legitimate goals by means compatible with both state and federal constitutional requirements. *See Wheeler v. Barrera*, 417 U.S. 402, 419-20 (1974) ("The choice of programs is left to the State . . . . If one form of services . . . is rendered unavailable because of state constitutional proscriptions, the solution is to employ an acceptable alternative form," and thus, "illegality under state law" would "not provide a defense" to federal noncompliance). The state should not be

[17]Northwest students, regardless of major, are required to take courses in math, lab science, English, art, music, history, and social science. *See* ER 12, p. 17 (General College Requirements).

entitled to claim a privilege to discriminate invidiously because its own administrative policy choices force it into an alleged constitutional conundrum. There is certainly no rule that says that when a state is caught between violating someone's federal constitutional rights and supposedly violating a state constitutional rule, that choosing the former is a permissible option.

In sum, the challenged restriction fails strict scrutiny.

II. THE STATE'S DISCRIMINATORY DISQUALIFICATION OF THOSE WHO DECLARE MAJORS IN THEOLOGY TAUGHT FROM A RELIGIOUS VIEWPOINT VIOLATES THE FREE SPEECH CLAUSE.

The state's anti-religious discrimination here, which penalizes both the declaration of a theology major and the religious viewpoint from which that major is taught, violates the federal constitutional right to free speech. Religion is admittedly an acceptable subject of study for Promise Scholars, including as their announced major. *See* Pet. Br. at 5 ("the Washington constitution . . . does not prohibit the secular study of the topic of religion"), 6 ("[t]his same constitutional line governs this scholarship aid" and "to this end" the disqualification of those pursuing a degree in theology was adopted). The state takes issue only with the *religious viewpoint* of such study, *supra* pp. 8-10.

A. The First Amendment Protects Religious Speech, Including Instruction, Against Viewpoint Discrimination.

Religious instruction is constitutionally protected. *Widmar v. Vincent*, 454 U.S. 263, 269 (1981) ("religious worship and discussion . . . are forms of speech and association protected by the First Amendment") (and cases cited). *See also Pierce v.*

Society of Sisters, 268 U.S. 510 (1925). "[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square Review and Advisory Bd. v. Pinette*, 514 U.S. 753, 760 (1995) (and cases cited).

> Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be *Hamlet* without the prince. Accordingly, *we have not excluded from free-speech protections religious proselytizing . . . or even acts of worship.*

Id. (citations omitted) (emphasis added in part). The Free Speech Clause therefore precludes discrimination against religious speech, including worship and instruction. *Id.* at 761 (strict scrutiny applies where expression was rejected "precisely because its content was religious"). Indeed, such discrimination constitutes viewpoint discrimination. *Good News Club v. Milford Central School*, 533 U.S. 98, 107-12 (2001); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 394 (1993); *Rosenberger v. Rectors and Visitors of Univ. of Va.*, 515 U.S. 819, 832 (1995) ("discriminating against religious speech was discriminating on the basis of viewpoint").

Viewpoint-based discrimination -- an even more egregious form of censorship than merely content-based discrimination, *Rosenberger*, 515 U.S. at 829 -- violates the right to free speech even in nonpublic fora. *See Lamb's Chapel*, 508 U.S. at 390-92; *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 806 (1985) ("government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject"). Hence, it is unnecessary to decide whether a forum is "public" or "nonpublic" -- in either case, such censorship is unconstitutional. *Lamb's Chapel*, 508 U.S. at 391-92. *Accord* Brief of Vermont

et al. at 19 n.6 (conceding that if forum analysis applies, the restriction must be viewpoint-neutral to be constitutional).

B. Rosenberger Controls this Case.

In *Rosenberger*, this Court held that when government makes funding broadly available for private, education-related uses, including private speech activities, that funding creates a forum for speech. 515 U.S. at 830. In such a forum, discrimination on the basis of the religious viewpoint of the speaker is unconstitutional. That the forum is more "metaphysical" than "spatial" is immaterial. *Id.*

Contrary to the state, Pet. Br. at 22, 45, *Rosenberger* cannot be distinguished from the present case on the premise that the program in *Rosenberger* was primarily designed to promote private speech. The purpose of the fund at issue in *Rosenberger* was not merely or even principally to promote private expression, but rather "to support a broad range of extracurricular student activities that 'are related to the educational purpose of the University.'" 515 U.S. at 824. Moreover, student groups engaged in news, entertainment, and communication were distinctly a minority -- 15 out of 118 -- of the groups receiving funding. *Id.* at 825. In the present case, as in *Rosenberger*, the state dispenses funds for the pursuit of private educational activities, including but not limited to speech, but imposes a viewpoint-based restriction on the program. *Rosenberger* is thus indistinguishable.[18]

The present case, of course, is even easier than *Rosenberger*. In *Rosenberger*, this Court divided sharply over the merits of the

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[18]Nor can *Rosenberger* be distinguished, as the state suggests, Pet. Br. at 47-48, by pitting *Rosenberger* against *Mitchell v. Helms*, 530 U.S. 793 (2000). The present program of grants to individual students, who then apply the funds to their own privately chosen educational course, is clearly analogous to *Rosenberger* and unlike the direct assistance to religious schools at issue in *Mitchell*.

government's asserted Establishment Clause justification for its viewpoint discrimination. Here, however, there is no Establishment Clause claim on the other side of the ledger. The state has never even made such a claim, and in any event, this Court's unanimous holding in *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986), would render any such claim meritless. Hence, the case at bar presents the much simpler question whether, in the absence of any countervailing Establishment Clause claim, express discrimination against private speech from a religious viewpoint violates the federal constitutional right to free speech. The answer, plainly, is "yes."

Notably, the restriction challenged here presents a double burden on speech from a religious viewpoint. First, the restriction disqualifies otherwise eligible scholarship recipients when they pursue a major in theology *taught from a religious perspective*. Instruction is speech, of course, and making instruction a disqualifying factor, for those who would receive that speech,[19] *because of the religious viewpoint* of that instruction, imposes a penalty precisely on the viewpoint of the speech. In this respect, the present case is identical to *Lamb's Chapel* and *Good News*, both of which involved targeted governmental discrimination against private instruction from a religious perspective. Second, the state only imposes the restriction at issue here in response to a communication: the declaration of a major. So long as a Promise Scholar keeps mum about his intended major (or even temporarily declares a major other than theology), there is no disqualification. But should a student formally utter an intent to major in theology, that student is instantly disqualified from receipt of the Promise Scholarship. Plainly, the state is imposing a burden -- an invidiously discriminatory burden, no less -- upon speech itself. This is

[19]The First Amendment protects not just the right to speak but also the right to receive that speech. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976).

patent state discrimination against private speech from a religious point of view, and it is unconstitutional under the Free Speech Clause.[20]

C. The Rules for Government Speech Do Not Shelter Washington's Discrimination Against Private Speech.

The state claims that there is a "neutral distinction between secular and religious instruction," Pet. Br. at 21. *See also id.* at 36, 39-44. This claim overlooks the "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality) (emphasis in original). There is a world of constitutional difference between a state eschewing any position pro or con on religious issues when the state is itself doing the teaching, on the one hand, *e.g.*, JA 84-85, and a state discriminating in its treatment of private speakers teaching from a religious perspective, *e.g.*, *Lamb's Chapel*; *Good News*; *Rosenberger*. The state therefore could not be more mistaken than when it asserts that "the same constitutional distinction," Pet. Br. at 23, controls both the government's treatment of its *own* speech and the government's treatment of *private* speech.

This is not a case where the state is itself speaking or merely contracting with private agents to deliver the state's message. *Compare Rust v. Sullivan*, 500 U.S. 173 (1991). Washington does not purport to exercise any control over a student's choice of a major (other than to bar theology majors), as for example

[20]Given that the restriction here fails strict scrutiny, *supra* § I(B), it is unnecessary to decide whether the anti-religious viewpoint discrimination at issue is ipso facto unconstitutional, *cf. Good News*, 533 U.S. at 106 ("The restriction must not discriminate on the basis of viewpoint"), or "merely" triggers strict scrutiny, *cf. id.* at 112-13 (leaving question unresolved).

with a program exclusively designed to fund nursing degrees. Nor can the state reasonably argue that receipt of a Promise Scholarship somehow suddenly converts all of that student's classes into government speech. Not only is that claim outlandish on its own terms, but such a view would also make the state responsible for the religious instruction that Promise Scholars with nontheology majors receive from private institutions in classes outside their major. The state would be trading a defense against discrimination in this case for a bevy of Establishment Clause difficulties.

III. THE STATE'S RECOURSE TO INAPPOSITE LINES OF CASES IS MERITLESS.

A. The "Decline-to-Fund" Cases are Inapposite.

Washington mischaracterizes this case as an attempt to force the state to fund religious education. *See, e.g.*, Pet. Br. at i ("require the state to fund religious instruction"), 12 ("refusal to fund his degree in theology"), 23-24. This is incorrect. The real issue is: if a state chooses to award scholarships on an otherwise neutral basis to financially needy, academically gifted college students, to enable them to defray the expenses of a college education, may the state discriminatorily strip the scholarship from an otherwise eligible student just because that student declares a major in a religious subject taught from a religious viewpoint? As demonstrated above, such anti-religious, viewpoint-based discrimination is unconstitutional. Davey may not have a right to have the state pay for his education. But he does have a right not to have the state invidiously discriminate against him.

The state therefore cannot find warrant for its discrimination in the various cases which the government merely refused to subsidize the exercise of a right. *E.g.*, *Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980); *Regan v. Taxation With Representation*, 461 U.S. 540 (1983); *Rust v. Sullivan*, 500 U.S. 173 (1991); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *United States v. American Library Ass'n*, 123 S. Ct. 2297 (2003). Respondent Davey does not dispute the state's prerogative to fund or not fund students in the pursuit of higher education at private colleges and universities. Once the state has undertaken such a program of aid to students, however, it may not invidiously discriminate against private choices on the basis of the religious viewpoints expressed therein. "[T]he First Amendment certainly has application in the subsidy context," *Finley*, 524 U.S. at 587, and "directed viewpoint discrimination . . . would prompt this Court to invalidate a statute on its face," *id.* at 583.

Thus, a state may decide to fund only a student's education prior to college; or to fund only students attending state schools; or to fund only students pursuing (for example) engineering degrees. Each of these would represent a religion-neutral, viewpoint-neutral parameter in a state program. Here, in stark contrast, the state has barred an otherwise eligible student, attending an otherwise eligible institution, pursuing an otherwise eligible major (theology), solely because that major is taught from a *religious* perspective. The state's criterion of exclusion -- religious viewpoint -- is simply incompatible with the federal constitutional protection of *private* religious choices and religious speech.

The cases the state relies on for its argument that the state is simply declining to fund the exercise of a right, Pet. Br. at 20, 24, are in no way inconsistent with the unconstitutionality of the discrimination at issue here. For example, were the state to fund private abortions or abortion counseling *except when undertaken for religious reasons* (*compare Maher*, *Harris*, and *Rust*), or give tax breaks for lobbying *except when the lobbying reflects a religious perspective* (*compare Regan*) or confer grants for artistic excellence *except when the art entails a religious viewpoint* (*compare Finley*), or condition federal discounts to

libraries on their screening out only Internet websites *with religious outlooks* (*compare Amer. Lib. Ass'n*), the invidious and unconstitutional discrimination would be clear. That is precisely the sort of invidious discrimination at issue here, and the *Maher/Regan* line of cases provides no shelter for such discrimination.

The state, Pet. Br. at 35, quotes *Norwood v. Harrison* for the proposition that a state could pursue religious neutrality "by withholding all state assistance," 413 U.S. at 462. In context, however, this Court was discussing the distinction between *private* and *public* schools, *id.*, not between private *secular* and private *religious* schools.

The state, Pet. Br. at 40, also quotes *Norwood*'s statement that a state is not "constitutionally obligated to provide even 'neutral' services to sectarian schools," 413 U.S. at 469. Of course, the state is not obligated to provide services to private schools *at all*. But that does not answer the question whether, when a state *does* provide aid to students attending religious colleges (as Washington does), it may do so in a religiously discriminatory manner. The 1973 decision in *Norwood* predates this Court's equal access jurisprudence (starting with *Widmar* in 1981) and important recent developments in educational assistance cases such as *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993); *Agostini v. Felton*, 521 U.S. 203 (1997); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). Nevertheless, one need not quarrel with the proposition that there are some limits even on the provision of neutral *services to religious schools*, to conclude nonetheless that religious-viewpoint-based discrimination in the provision of neutral *benefits to students*, especially in the admitted absence of any countervailing Establishment concerns, is simply intolerable under the Constitution.

B. <u>The Doctrine of Unconstitutional Conditions Leads to the Same Result.</u>

Washington devotes considerable effort to its argument that the anti-religious discrimination at issue here does not violate the "unconstitutional conditions" doctrine. *E.g.*, Pet. Br. at 26-32. This argument is largely beside the point, because the unconstitutionality of the restrictions at issue follows directly from the specific Free Exercise and Free Speech case law cited herein. *See supra* §§ I-II. There is no need for recourse to the more general "unconstitutional conditions" doctrine, which in the state's argument appears more a distraction than anything else. Nevertheless, it merits note that the state scheme at issue here fails constitutional muster under that doctrine, even on the state's own argument terms. *See, e.g., Speiser v. Randall*, 357 U.S. 513 (1958) (discriminatory denial of benefit for engaging in certain speech is a restriction on that speech). The disqualifying restrictions at issue have "placed a condition on the *recipient* of the subsidy rather than on a particular program or service," Pet. Br. at 26 (internal quotation marks and citation omitted; emphasis in original): the *status* of the Promise Scholar -- as a declared theology major *vel non* -- is determinative, and the disqualification attaches even if the recipient exclusively uses his own personal funds for any religious instruction he receives. The state does not "limit[] the use of funds for the specific activity at issue," Pet. Br. at 27, but instead categorically disqualifies declared theology majors regardless of their course selection or their use of the state aid funds.[21]

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[21]The state is therefore incorrect when it says it "restricts only the type of instruction that the state . . . will underwrite." Pet. Br. at 27 n.7. On the contrary, the state restricts only *students* on the basis of their *status*, i.e., according to their declared *major* (and its viewpoint). A Promise Scholar with no declared major (or, say, a major in psychology) can take a

(continued...)

Washington concedes that "government cannot discriminate invidiously in its subsidies," Pet. Br. at 30 (internal quotation marks and citation omitted). That proposition suffices to dispose of the present case.

IV. THE STATE'S DISCRIMINATORY DISQUALIFICATION OF THEOLOGY MAJORS VIOLATES THE ESTABLISHMENT CLAUSE.

Just as the Free Exercise and Free Speech Clauses point solidly to the unconstitutionality of the state's express anti-religious discrimination here, so does Establishment Clause analysis lead to the same conclusion.

The Establishment Clause requires neutrality and forbids hostility toward religion. As this Court has often explained, the Establishment Clause "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947). *Accord Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (Establishment Clause forbids government action with an effect that "inhibits religion"). The discriminatory treatment of religious activities "would demonstrate not neutrality but hostility toward religion." *Board of Educ. v. Mergens*, 496 U.S. 226, 248 (1990). *Accord McDaniel*, 435 U.S. at 641 (Brennan, J., concurring in judgment) ("The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion").

Moreover, discriminatory treatment of religious instruction requires the censor to make a judgment about what is and is not religious. This creates additional constitutional problems of "entanglement":

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[21](...continued)
courseload *identical* to that of a declared theology major, yet only the latter student is disqualified from receipt of the scholarship. If that is not placing a condition on the recipient, *id.*, then nothing is.

> [state officials] would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove an impossible task in an age where many and various beliefs meet the constitutional definition of religion. . . . There would also be a continuing need to monitor group meetings to ensure compliance with the rule.

Widmar, 454 U.S. at 272 n.11 (internal quotation marks and citations omitted).

Thus, treating private *religious* choices in education on equal terms with private *secular* choices in education "would in fact *avoid* entanglement with religion," *Mergens*, 496 U.S. at 248 (emphasis in original; citation omitted).[22]

Here, the state denies equal treatment precisely to those persons who pursue a degree which the state (or its designated representative) deems "religious." This is diametrically opposed to Establishment Clause neutrality, and thus unconstitutional. *Accord McDaniel*, 435 U.S. at 636-42 (Brennan, J., concurring). "The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *Id.* at 641.

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[22]As noted earlier, *supra* pp. 7-8, the state delegates the definition of "theology" to the private colleges, presumably as an attempt to resolve the entanglement problem. But either the state must ultimately retain authority to review this determination, as the state regulations indicate, *see* WAC 250-80-100(1)(b) (JA 186) (HECB "shall be responsible for . . . (b) Determination of student eligibility"), or else the state is conceding it has no real interest in enforcing this provision.

V. THE STATE'S DISCRIMINATORY TREATMENT OF THEOLOGY MAJORS VIOLATES THE EQUAL PROTECTION CLAUSE.

The Equal Protection Clause likewise forbids discrimination against the religious choices of private individuals. "At a minimum," governmental classifications "must be rationally related to a legitimate government purpose," while "classifications affecting fundamental rights . . . are given the most exacting scrutiny." *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

A restriction on the private choice to pursue a religious degree taught from a *religious* viewpoint -- but not the private choice to pursue a religious degree taught from a *secular* viewpoint -- obviously represents a classification "affecting fundamental rights," namely, the rights to free speech and free exercise of religion. Moreover, the restriction incorporates the "inherently suspect distinction[]" of "religion," *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Hence, strict scrutiny applies.

As demonstrated above, there is no compelling need to disqualify from the Promise Scholarship program those students, and only those students, who personally choose to declare an intent to obtain a degree in theology taught from a religious perspective. Nor is the restriction at issue narrowly tailored to any asserted state interest. Indeed, the arbitrary and selective disqualification of those pursuing theology majors taught from a *religious* viewpoint could only "rest on an irrational prejudice." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 450 (1985) -- in this case, a bias against religion as such -- which would "fail rationally to justify singling out" religious speech for special restrictions, *cf. id. Accord Widmar*, 454 U.S. at 281 (Stevens, J., concurring in judgment) (perceiving no valid reason to exclude religious worship where comparable secular discussions are allowed).

Finally, the hostile targeting of the viewpoint of speech denies

the equal protection of the laws under this Court's decisions recognizing that the same nondiscrimination norms govern both the Free Speech Clause, *see supra* § II, and the Equal Protection Clause. *See Police Dep't v. Mosley*, 408 U.S. 92, 94-99 (1972); *Carey v. Brown*, 447 U.S. 455, 461-63 (1980); *RAV v. City of St. Paul*, 505 U.S. 377, 384 n.4 (1992).

CONCLUSION

Just as "the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity," *Grutter v. Bollinger*, 123 S. Ct. 2325, 2340 (2003), so must such "pivotal" education, *id.*, be accessible to all individuals regardless of religion. Thus, when a state adopts a scholarship program to support students seeking higher education at private colleges and universities, that state program must remain free from invidious state discrimination against private religious choices and private religious viewpoints. The Ninth Circuit correctly concluded that Washington ran afoul of that constitutional norm when it disqualified Joshua Davey from a state scholarship, to which he was otherwise entitled, solely because he declared a major that included theology taught from a religious viewpoint.

This Court should affirm the judgment of the U.S. Court of Appeals for the Ninth Circuit.

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IN THE SUPREME COURT OF THE UNITED STATES

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, ET AL.,

Petitioners,

v.

JOSHUA DAVEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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A. The Establishment Clause Does Not Afford The Protection Of Individual Conscience In Religious Matters Required By the Washington Constitution

1. In *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 488 (1986) (*Witters* II), this Court ruled that Washington did not violate the Establishment Clause when it provided state aid to a student to be used "to support his religious education". However, in *Witters v. Washington Commission for the Blind*, 112 Wash. 2d 363, 369, 771 P.2d 1119, 1121 (1989) (*Witters* III), *cert. denied sub nom. Witters v. Washington Department of Services for the Blind*, 493 U.S. 850 (1989), the Washington Supreme Court ruled that the "state constitution prohibits the use of public moneys to pay for such religious instruction". The difference in these decisions reflects the fact that the Washington Constitution protects individual conscience in religious matters that are not protected by the Establishment Clause.

Article I, section 11 of the Washington Constitution provides that "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment[.]" Pet. 88a. This provision, which focuses on freedom of conscience through avoiding "compelled support", is different in scope from the separate mandate in the federal constitution to avoid the establishment of religion.

2. There is no question that the aid to the student in *Witters* II was used for religious education. *Agostini v. Felton*, 521 U.S. 203, 225 (1997) ("the grant recipient [in *Witters* II] clearly would use the money to obtain religious education"). Despite this fact, the Court concluded that the program did not violate the Establishment Clause because the neutrally available state aid did not "confer any message of state endorsement of religion". *Witters* II, 474 U.S. at 489. There is no Establishment Clause

violation when "the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government". *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002). Thus, "the circuit between government and religion [is] broken, and the Establishment Clause [is] not implicated". *Id.*

3. In contrast to the Establishment Clause, article I, section 11 protects individual rights of conscience by prohibiting the use of tax dollars for certain religious purposes. This concern for individual conscience lies at the heart of the Washington Constitution and is a concept that dates from the earliest days of the republic to modern times. It was expressed in a comment to a draft constitution placed before Washington's 1889 constitutional delegates:

> "The right to worship according to one's own conscience has been recognized as an absolute and fundamental possession of every man, from before the foundation of the republic; the right not to worship at all, *nor contribute to the support of religion, is now considered to rest upon equally firm foundations.*" W. Lair Hill, *Washington: A Constitution Adapted To The Coming State; Outline And Comment On Leading Features Submitted For Examination*, The Oregonian, July 4, 1889, at 9 (emphasis added).

This view was echoed in 1975 when Washington voters defeated a proposed constitutional amendment to authorize such assistance as would be permitted by the United States Constitution for students of all educational institutions, including those with religious affiliation or influence.[1] Arguments against the amendment expressed concern that "all taxpayers could be forced to subsidize

[1] Official Voters Pamphlet 14-15, 28 (1975) (House Joint Resolution 19).

specific religious teachings regardless of their own belief".[2]

Over the course of centuries states have adopted[3] and reaffirmed[4] such policies against compelled support for religious activities, rooted in the view in the Virginia Bill of Religious Freedom that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical". Va. Code Ann. § 57-1.

4. Thus, in *Witters* III, the court concluded that intervening private choice did not change the fact that compulsory tax payments were used to finance religious instruction. *Witters* III, 112 Wash. 2d at 370, 771 P. 2d at 1121. Other states have reached the same conclusion that intervening private choice does not break the circuit between tax dollars and support of religion.[5]

5. Indeed, in other contexts, this Court has rejected the notion that private choice breaks the circuit

[2] *Id.* at 15.

[3] *See, e.g.*, Pennsylvania Const. of 1776, art. II ("And that no man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent[.]"); Indiana Const. of 1851, art. 1, § 4 ("[N]o man shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent.").

[4] *See, e.g., Holmes v. Bush*, No. CV 99-3370, 2002 WL 1809079, at *2 (Fla. Cir. Ct. 2002): "While the 1968 Constitutional Revision Commission proposal for Article I, § 3 removed the prohibition of governmental aid to religious institutions (a provision extant since the 1885 Constitution), the Florida Legislature took action to retain and to strengthen the restriction and its applicability to 'indirect' aid."

[5] *California Teachers Ass'n v. Riles*, 29 Cal. 3d 794, 632 P.2d 953, 960-64, 176 Cal. Rpt. 300 (1981); *Dickman v. Sch. Dist. 62C*, 232 Or. 238, 366 P.2d 533, 539-42 (1961), *cert. denied sub nom. Carlson v. Dickman*, 371 U.S. 823 (1962); *Fannin v. Williams*, 655 S.W.2d 480, 483-84 (Ky. 1983); *Bd. of Educ. For Indep. Sch. Dist. 52 v. Antone*, 384 P.2d 911 (Okla. 1963).

between tax dollars and an unconstitutional application of the funds. In *Norwood v. Harrison*, 413 U.S. 455 (1973), the Court struck down a state law that provided textbooks to all students, even those attending segregated schools. The private choice of the student to attend a public school or a segregated private school did not break the circuit between the state assistance and the discriminatory schools. *Id.* at 464-65 ("When [a] necessary expense is borne by the State, the economic consequence is to give aid to the enterprise; if the school engages in discriminatory practices the State by tangible aid in the form of textbooks thereby gives support to such discrimination.").

In *Norwood*, educational assistance to students attending a school that practiced race discrimination was not viewed the same as a government employee spending a private paycheck for segregated school tuition. The fact that there was independent choice did not change the public character of the funds. Similarly, the use of public funds to pay for religious instruction does not change the public character of the funds or satisfy Washington's constitutional protection of freedom of conscience through avoiding compelled support of religious instruction.

6. Protecting freedom of conscience from compelled support is an important value that this Court has recognized in other contexts. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (agency-shop dues of nonunion public employees could not be used to support political and ideological causes that were not germane to collective bargaining activities); *Keller v. State Bar of California*, 496 U.S. 1 (1990) (state bar may not use members' compulsory dues to fund activities of an ideological nature that were not related to regulation of the legal profession and improving legal services). These decisions trace the interest in avoiding required support for such beliefs to the writings of Madison and Jefferson in defense of religious liberty. "This view has long been

held", the Court in *Abood* noted, citing Madison's writings and Thomas Jefferson's view, that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical". *Abood*, 431 U.S. at 234-35 n.31 (quoting 2 The Writings of James Madison 186 (Hunt ed. 1901); I. Brant, *James Madison: The Nationalist* 354 (1948)).[6]

B. Washington Is Not Required To Subsidize Davey's Pursuit Of A Theology Degree

1. In the opening brief we explained that this case is governed by the principle that the legislative decision not to subsidize the exercise of a fundamental right does not infringe that right. Pet'r Br. 22-25. Davey's amici argue that this principle is limited to government speech and practices, like abortion, that the government may choose to discourage.[7] This Court has put no such limit on the funding principle. Rather, this principle encompasses a wide range of policy objectives, including policies that address the appropriate source of funds for activities that are not themselves disfavored. For example, in *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), the Court ruled that there was no right to tax exempt status for an organization engaged in constitutionally protected lobbying activities. *Regan* did

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[6] The fact that Washington's heightened protection of individual conscience is not required by the federal constitution does not mean such interests must be disregarded. Such interests cannot overcome the need to maintain the integrity of a public forum by allowing expression of viewpoints (*Widmar v. Vincent*, 454 U.S. 263 (1981); *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819 (1995)) and do not give rise to a federal free speech right to decline to pay fees that support government facilitation of wide ranging public discourse. *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000). But these cases do not stand for the proposition that these interests are not significant and do not otherwise limit Washington's ability to recognize these interests through their political processes.

[7] *See, e.g.*, Brief Of Amici Curiae State Of Texas, et al., at 19-21 (government speech); Brief Amici Curiae Of The Council For Christian Colleges & Universities, et al., at 23-26 (abortion).

not involve government speech and there is nothing in the decision to suggest that Congress was trying to discourage the practice of lobbying. According to the Court, Congress simply "chose not to subsidize lobbying as extensively as it chose to subsidize other activities that non profit organizations undertake to promote the public welfare". *Regan*, 461 U.S. at 544. Here, the scholarship funding is based on the state constitutional policy of protecting individual rights of conscience by prohibiting compelled support of religious instruction and worship.

2.(a) This argument also assumes that the Washington Constitution is hostile toward religion. There is no basis for this assumption. Article I, section 11 traces back to the Virginia Bill of Religious Freedom. *Supra* p. 3. In fact, the guarantee of religious freedom embodied in article I, section 11 "extends broader protection than the first amendment of the federal constitution". *First Covenant Church v. City of Seattle*, 120 Wash. 2d 203, 229-30, 840 P.2d 174, 189 (1992); Pet'r Br. 31-32.

(b) Davey and his amici argue that article I, section 11 is hostile to religion because they claim it arose out of anti-Catholic bigotry related to the Blaine Amendment. Resp't Br. 20 n.8.[8] Whatever anti-Catholic prejudice may have existed in other states, that is not the constitutional history in Washington. Nothing in the history of the adoption of article I, section 11 suggests that it was the product of anti-Catholic prejudice.[9] Moreover, the suggestion by some amici that the purpose of the constitution was to permit Protestant worship in public schools while denying the same funding to "sectarian" schools is false.[10]

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[8] *See, e.g.*, Brief Amici Curiae Of Common Good Legal Defense Fund, et al., at 7-13.

[9] *See* Brief Of Amicus Curiae Of Historians And Law Scholars On Behalf Of Petitions Gary Locke, et al. at 26-30.

[10] Some amici suggest that rejection of a proposal to include in article IX, section 4 an explicit prohibition on religious exercises in public schools is evidence that religious neutrality was not the framers' intent. Brief of Amici Curiae State of Texas, et al., at 28. Yet a contemporaneous report of the constitutional convention is to the contrary, indicating a delegate "wanted to add a clause that no religious exercises or instruction shall be permitted therein. This was not objected to except upon the score of being unnecessary." Spokane Falls Review, Aug. 11, 1889, p. 2, col. 6.

In 1891, two years after the constitution was adopted, the Washington Attorney General interpreted article I, section 11 to prohibit all Bible reading and religious exercise in public schools. According to the Attorney General, the terms "religion" and "religious" as used in article I, section 11 "apply to all forms of religion and religious worship and belief". 1 Op. Att'y Gen. 142, 145 (1891). In particular, the Attorney General concluded that the King James version of the Bible could not be read in public schools because it was "a sectarian book". *Id.* at 150. In 1918, the Washington Supreme Court cited this opinion with approval when it ruled that article I, section 11 prohibited all Bible study—including Protestant, Catholic, or Jewish Bibles—in the public schools. *Washington ex rel. Dearle v. Frazier*, 102 Wash. 369, 173 P. 35 (1918). Thus, there is no basis for the claim that article I, section 11 was an anti-Catholic ruse to preserve the Protestant religion in the public schools.

3. Davey also argues that *Regan* and the other funding cases do not apply because *Sherbert v. Verner*, 374 U.S. 398 (1963), and *McDaniel v. Paty*, 435 U.S. 618 (1978), prohibit a classification based on religion. Resp't Br. 13, 22. This argument is not well taken. In both cases individuals were denied a secular benefit because of their religious practice. In *Sherbert*, the individual would have to work on Saturday in violation of her religion to receive unemployment compensation. In *McDaniel*, the individual would have to give up being a minister in order to be a delegate to the state constitutional convention. Neither case turned on religious classification. Unlike *Sherbert* and *McDaniel*, Davey's ineligibility for the

scholarship was not because of his religious practice. He acknowledges that his religious beliefs and practice would not have disqualified him if he had majored in business. JA 116. Davey was only ineligible because he wanted to take a course of study that was beyond the scope of the scholarship program.

4.(a) Both *Sherbert* and *McDaniel* are examples of unconstitutional conditions being imposed on the recipient of benefits. *Harris v. McRae*, 448 U.S. 297 (1980), distinguished *Sherbert* on this basis. In *Harris*, the Court concluded that the Hyde Amendment, which prohibited using Medicaid dollars to fund abortions, did not impinge on the constitutionally protected freedom of choice recognized in *Roe v. Wade*, 410 U.S. 113 (1973). According to *Harris*, the Court in *Sherbert* held that the state could not "withhold *all* unemployment compensation benefits from a claimant who would otherwise be eligible for such benefits but for the fact that she is unwilling to work one day per week on her Sabbath". *Harris*, 448 U.S. at 317 n.19. In contrast, *Harris* concluded that the Hyde Amendment "does not provide for such a broad disqualification from receipt of public benefits". *Id.* Instead, the Hyde Amendment "represents simply a refusal to subsidize certain protected conduct. A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *Id.* The same is true of the scholarship—Washington only refuses to subsidize Davey's theology degree. It did not impose a broader disqualification. Davey could have pursued his theology degree halftime at Northwest College and used his scholarship to get his business degree halftime at another college.

(b) Davey does not dispute the fact that he could have pursued his theology degree at Northwest and used his scholarship at another school. Instead, he argues that requiring him to attend another school imposes an unconstitutional condition upon him because his decision

to attend Northwest was based on his religious conviction. But this is no different than the situation in *Harris* and *Maher v. Roe*, 432 U.S. 464 (1977). In both cases, the women wanted the state to pay for them to exercise their constitutional right to terminate their pregnancies. They had the same constitutional right to have an abortion as Davey has to attend Northwest and pursue a theology degree. The fact that the government would not pay for their abortions did not violate their constitutional rights. As the Court observed in *Maher*, "[t]he Connecticut regulation places no obstacles absolute or otherwise in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires." *Maher*, 432 U.S. at 474. Similarly, Davey suffers no state-imposed disadvantage as a consequence of Washington's decision to not subsidize his theology degree.

(c) Davey's argument that "[t]he state's only recourse is to deny that the restrictions *in fact* require a scholarship recipient to forego pursuit of a theology major" (Resp't Br. 23) also misses the mark. The critical point is that the state did not require Davey to discontinue his pursuit of a theology degree, an ineligible activity under the program, in order to receive funding for eligible activities. The fact that he may forego the state funding because he finds practical problems in pursuing eligible activities concurrently with his pursuit of ineligible activities does not convert the funding limitations to an unconstitutional condition. In *Maher*, the government offered Medicaid funding to cover the medical expenses associated with childbirth but not the costs of an abortion. The fact that a woman could not avail herself of the funding program and the constitutional right to an abortion at the same time did not convert the funding parameters of the program to an

"unconstitutional condition", so long as the ineligibility did not extend beyond the refusal to fund the particular activity.

(d) Davey's amici suggest that the scholarship imposes an unconstitutional condition because the scholarship cannot be used to pay for the secular courses that Davey will take at Northwest.[11] But Davey is in an integrated degree program. Nothing in this record suggests that he pays some tuition for his theology courses and some for his secular courses. The state is under no obligation to segregate out different parts of Davey's course selection.

C. The Scholarship Does Not Violate the Free Exercise Clause

1. In our opening brief we explained that the eligibility requirement in the Promise Scholarship does not violate Davey's right to freely exercise his religion. Pet'r Br. 36-39. Thus, unlike the ordinance at issue in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the requirement does not prohibit or regulate Davey's practice of his religion. Unlike *Sherbert* and *McDaniel*, the scholarship does not impose an unconstitutional condition on Davey. *Supra* pp. 8-9.

2. Davey and his amici argue that the scholarship discriminates against religion on its face and is, therefore, subject to strict scrutiny. They make essentially two arguments. First, they seem to argue that any law that refers to religion is facially discriminatory.[12] Here, article I, section 11 provides: "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment[.]" Pet. 88a. Wash. Rev. Code § 28B.10.814 prohibits using aid for "pursuing a degree in theology". Pet. 92a.

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[11] *See, e.g.*, Brief of Amicus Curiae Theresa Becker, at 7-10.

[12] *See, e.g.*, Brief of Amici Curiae State of Texas, et al., at 9-11.

(a) This mechanistic approach, applying strict scrutiny whenever a law refers to religion, completely bypasses the central question—whether the object or purpose of the law is to suppress religious beliefs or practices. But ascertaining whether this object or purpose is present is the very reason for examining the text of the law. *Lukumi*, 508 U.S. at 533. *Lukumi* does not stand for the proposition that any express mention of religion in the text of a law constitutes facial discrimination that automatically triggers strict scrutiny. Express distinctions on the basis of religion are contained in a number of laws,[13] and any of these laws—if viewed as isolated texts —could be viewed as favoring or disfavoring individuals on the basis of religion. If these distinctions gave rise to "automatic" strict scrutiny, this Court's reference in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872, 890 (1990), to state statutes that contain a "nondiscriminatory religious-practice exemption" would be a *non sequitur*. This is not the rule.

(b) Indeed, applying strict scrutiny in the automatic fashion suggested by Davey would disregard the historic role of the states in preserving freedom of conscience in matters of religion. If state laws that make distinctions based on religion were automatically catapulted into strict scrutiny, the state law context and broader approach would never be given consideration. But this broader context deserves consideration. The Religion

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[13] *See, e.g.*, Wash. Rev. Code § 16.50.150 (religious ritual slaughter of animals exempt from certain requirements for humane slaughter of livestock); Wash. Rev. Code § 18.22.230 (exempting certain medical treatments from licensing when treatment by prayer or spiritual means in accordance with religious tenets); Wash. Rev. Code § 28A.320.140 (school dress codes may not preclude students from wearing clothing in observance of their religion); Wash. Rev. Code § 66.44.270 (law against supplying liquor to a person under the age of twenty-one does not apply when such liquor is minimal amount necessary for a religious service).

Clauses of the First Amendment did not apply to the states until 1940. *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Prior to that time, state constitutions provided the only protection for religious liberty at the state level. Thus, in *Dearle*, 102 Wash. 369, 173 P. 35, the Washington Supreme Court applied article I, section 11 to prohibit Bible reading in public schools 45 years before this Court applied the Establishment Clause to prohibit the same practice. *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963).

In other contexts, this Court has "take[n] into account the interests of state and local authorities in managing their own affairs" with special consideration "where States historically have been sovereign". *Missouri v. Jenkins*, 515 U.S. 70, 113 (1995) (O'Connor, J., concurring) (quoting *Milliken v. Bradley*, 433 U.S. 267, 281 (1977)); *United States v. Lopez*, 514 U.S. 549 (1995). As in these areas, the states' sovereignty and historical traditions should not now be minimized by a peremptory application of strict scrutiny whenever state laws call for distinctive treatment. State laws should be considered in the context of the state's overall approach to freedom of conscience in matters of religion, and strict scrutiny should not be applied simply because religion is mentioned in the text of a state law.

3. Davey and his amici also argue that the scholarship discriminates on its face because they claim it only prohibits teaching theology from a religious point of view. Resp't Br. 19.[14] In Davey's view, teaching comparative religion in public colleges and universities constitutes teaching theology from the secular point of view. Thus, Davey claims viewpoint discrimination as if public universities taught Protestant theology but the state would not permit scholarships to teach Catholic theology.

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[14] *See, e.g.*, Brief of Amicus Curiae Fairness Foundation, at 17-19.

Davey's comparison is mistaken. Theology and comparative religion do not represent different viewpoints about the same subject. Theology is the study of the nature of God and religious truth. It is designed to inculcate belief (or disbelief) in God. A degree in theology prepares students for positions of religious leadership. There is no dispute that this was the degree Davey was seeking. *See* note 17 *infra* p. 17. In contrast, courses involving religious ideas in public colleges and universities in Washington are studied as an aspect of the general intellectual and cultural history of societies and civilizations. JA 84. Thus, the Comparative Religion Department at the University of Washington is in the Jackson School of International Studies. JA 83. One proof that theology and comparative religion are not the same subject is the fact that the Establishment Clause does not prohibit "teaching about religion, as distinguished from the teaching of religion, in the public schools". *Abington Township*, 374 U.S. at 306 (Goldberg, J., concurring). Similarly, article I, section 11 does not prohibit teaching about religion in the public schools. *Calvary Bible Presbyterian Church v. Bd. of Regents of Univ. of Wash.*, 72 Wash. 2d 912, 919, 436 P.2d 189, 193 (1967), *cert. denied*, 393 U.S. 960 (1968). If teaching comparative religion was the equivalent of teaching Protestant or Catholic theology, both of these decisions would be wrong. In fact, theology and comparative religion are two separate subjects—not different viewpoints about the same subject.

4.(a) Even if theology and comparative religion are considered to be the same subject, the Promise Scholarship does not discriminate against religion. As we explained in our opening brief, it is permissible to draw a distinction between secular and religious instruction. Pet'r Br. 39-44. Davey argues that this line is not permissible because it overlooks the distinction between government speech endorsing religion, which the

Establishment Clause prohibits, and private speech endorsing religion, which the Free Exercise Clause protects. Resp't Br. 37. Davey's distinction makes no sense. When the government gives aid to private religious schools—that are engaging in private speech—the aid must be secular. *Mitchell v. Helms*, 530 U.S. 793 (2000). And this secular aid may not be diverted to religious instruction. *Id.* at 840 (O'Connor, J., concurring in the judgment); *id.* at 890 (Souter, J., dissenting). Thus, the distinction between secular and religious instruction is not limited to government speech.

(b) In contrast to Davey, the United States acknowledges the line between secular and religious instruction. U.S. Amicus Br. 16. However, the government argues that the distinction does not apply where the line is directed at a religious practice based on its motivation. The government misunderstands the eligibility requirement in the scholarship. It is not based on a student's motivation. The state does not inquire or know why a student is pursuing a degree in theology. And even the Ninth Circuit majority acknowledged that the scholarship "neither prohibits religious conduct nor does its application turn on the student's religious motivation". Pet. 14a. Davey also recognizes that the eligibility requirement does not turn on the student's motivation. He correctly points out that "confirmed atheists . . . are nevertheless barred by Washington's restriction from majoring in theology". Resp't Br. 31.[15]

(c) The United States also argues that the line between secular and religious instruction applies only in the context of the Establishment Clause. U.S. Amicus Br. 16-17. But there is no logical reason this neutral line is not equally valid in other contexts. Avoiding the

[15] The government's argument that Washington's law lacks general applicability is similarly flawed. U.S. Amicus Br. 17. The restriction against using the scholarship to pursue a degree in theology is not based on the student's motivation.

establishment of a state-sponsored church is, unquestionably, an important interest. However, avoiding establishment is not the only important interest that can be furthered by an awareness of religion's existence in distributing public funds. Declining to apply government funds to religious enterprises can also serve the undeniably important interest of avoiding compelled support of religious ideas with which taxpayers may disagree, and the line this Court has recognized between secular and religious instruction furthers this important state goal.

Moreover, the "play in the joints" this Court recognized in *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970), acknowledged that the essential goal of protecting religious liberty is not amenable to simple and categorical solutions. *Cf. Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 847 (1995) (O'Connor, J., concurring) (resolution of cases at difficult intersection of government neutrality and non-funding not susceptible to categorical platitudes). Nothing in the Court's recognition of the need for play in the joints to avoid establishment suggests that such play is not also called for to protect other important concerns necessary to protect religious liberty.

5. Davey argues at length that the Promise Scholarship does not withstand strict scrutiny. Resp't Br. 24-33. As an initial matter, these arguments are not well taken because the scholarship is a neutral law of general applicability that is not subject to strict scrutiny. Davey also overstates the case of strict scrutiny.

(a) At the outset Davey cites *Widmar v. Vincent*, 454 U.S. 263 (1981), for the proposition that avoiding government funding of religious instruction to comply with a state constitution can never be a compelling interest. Resp't Br. 26-27. Yet this is clearly not the holding of *Widmar*. The Court was careful to "limit our holding to the case before us". *Widmar*, 454 U.S. at 276. The Court found it was "unnecessary for us to decide

whether, under the Supremacy Clause, a state interest, derived from its own constitution, could ever outweigh free speech interests protected by the First Amendment". *Widmar*, 454 U.S. at 275-76 (footnote omitted). Here, the importance of state constitutions in protecting religious liberty (*supra* pp. 11-12) and the long history of protection of individual conscience by prohibiting compelled support (*supra* pp. 2-3) constitute a compelling state interest.

(b) Davey argues that the eligibility requirement in the Promise Scholarship is not narrowly tailored because it is both under and over inclusive. Resp't Br. 30-32. He argues that the requirement is underinclusive because it only applies to those seeking a degree in theology and not to non-theology majors who take a theology class.[16] His position appears to be that this test requires a state to fund all instruction that has religious components or fund none. However, he does not explain how failure to include all courses with religious components gives rise to the primary concern addressed by an "underinclusive" inquiry—i.e., whether the statute is serving the state's asserted interest or is a pretext for other interests, as in *Lukumi*, 508 U.S. at 544-45

[16] This argument is directed at Wash. Rev. Code § 28B.10.814, which prohibits using state aid to pursue a degree in theology. Pet. 92a. It does not implicate the broader language of article I, section 11. In *Witters* III, the Washington Supreme Court ruled that article I, section 11 prohibits funding a degree for training a pastor. In adopting Wash. Rev. Code § 28B.10.814, the Legislature applied this constitutional line. However, it has not been decided whether the Washington Constitution would permit non-theology majors to use state aid to take theology classes. In *Washington ex rel. Gallwey v. Grimm*, 146 Wash. 2d 445, 468, 48 P.3d 274, 285 (2000), the majority distinguished *Witters* III and upheld a student aid program because it contained a "religious *exclusion* which provides that no student will be enrolled in any program that includes religious worship, exercise, or instruction". The dissent disagreed stating that "religious instruction in preparation for the ministry[ ] is not all that our state constitution forbids". *Id.* at 492, 48 P.3d at 297. The Washington Supreme Court has yet to consider whether article I, section 11 forbids aid for students taking theology classes who are not training for the ministry.

(ordinance claimed to protect public health and prevent cruelty to animals is underinclusive for those ends when it failed to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than the religious sacrifice). In *Witters* III, the Washington Supreme Court focused on religious training for the ministry. Theology degree programs are commonly understood to be programs whose students are preparing for positions of religious leadership.[17] Applying public funds to such preparation is near the core of the concern that a taxpayer not be "put in the position of paying for the religious instruction of aspirants to the clergy with whose religious views they may disagree" (*Witters* III, 112 Wash. 2d at 365, 771 P.2d at 1120), thus compelling a person to "furnish contributions of money for the propagation of opinions which he disbelieves". Va. Code Ann. § 57-1.

(c) Davey also argues that Wash. Rev. Code § 28B.10.814 is overinclusive because it would apply to individuals who seek a degree in theology but never intend to pursue a career in the ministry. Resp't Br. 31. This argument ignores the fact that the use of public funds for religious instruction itself is objectionable. The state has no control over how the training will be used.

[17] *See, e.g.*, The Association of Theological Schools, *Fact Book on Theological Education 2002-2003*, at http://www.ats.edu/data/factbook (visited Oct. 13, 2003). This is the express purpose of the Northwest College Pastoral Ministries degree: "The Pastoral Ministries major is designed to prepare students for vocational ministry as a pastor in the local church. The core courses should enable the student to develop and express biblical concepts of the church and pastoral ministry and acquire skills needed to engage in effective pastoral ministry." http://www.nwcollege.edu/catalog/programs/pasminmaj.html (visited Oct. 13, 2003).

D. The Scholarship Does Not Violate The Free Speech Clause

In our opening brief, we explained that the Promise Scholarship does not violate the Free Speech Clause because it does not establish a forum. Pet'r Br. 44-47. In response, Davey argues that a program that facilitates a broad spectrum of educational activity is a forum. This argument ignores the purpose of a forum, which is to encourage a diversity of views from private speakers. The purpose of the Promise Scholarship is not to facilitate diversity of views from students or teachers. It is to provide education. The argument made by Davey was rejected in *United States v. American Library Association*, 123 S. Ct. 2297, 2305 (2003) (plurality opinion) ("public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak"); Pet'r Br. 46-47. Since the Promise Scholarship does not establish a forum, it does not violate the Free Speech Clause for Washington to adhere to the neutral line between secular and religious instruction. *Supra* pp. 13-15.[18]

E. The Scholarship Does Not Violate The Establishment Clause Or The Equal Protection Clause

Although the Court of Appeals did not reach these issues and they were not raised in Davey's Brief In Opposition, Davey argues that the Promise Scholarship

[18] Davey also argues that he was ineligible to receive the scholarship because he engaged in the speech of declaring his major in pastoral studies. Davey misunderstands the eligibility requirement. Wash. Rev. Code § 28B.10.814 provides that aid may not be used to pursue a theology degree. Eligibility is not based on the declaration of a major. Lana Walters, the financial aid administrator at Northwest College, explained to students that they should not accept the scholarship if they are pursuing a degree in theology—even if they do not initially declare a theology major. JA 156-59.

violates the Establishment Clause and the Equal Protection Clause of the Fourteenth Amendment. Neither of these arguments are well taken.

Davey claims that the state's refusal to pay for a degree in theology demonstrates a hostility toward religion that violates the Establishment Clause. Resp't Br. 42. However, as we have explained, refusal to use state funds to pay for religious instruction does not evidence hostility toward religion. *Supra* pp. 6-7. Davey also argues that determining what constitutes a degree in theology will result in excessive entanglements between church and state. Resp't Br. 42-43. There is no basis for this claim. The Court has "always tolerated some level of involvement between the two. Entanglement must be 'excessive' before it runs afoul of the Establishment Clause." *Agostini v. Felton*, 521 U.S. 203, 233 (1997). In this case, it is up to the school the student is attending to determine, as the one with the best knowledge of its curriculum, whether the student is pursuing a degree in theology. JA 126, 131, 137. The Higher Education Coordinating (HEC) Board does not make this determination. JA 128-30. Although the HEC Board is ultimately responsible for granting the scholarship, there is no evidence in this record that private religious colleges are trying to evade the limitation on scholarships. Indeed, the record in this case is that the financial aid administrator at Northwest College is scrupulous about following the requirements of the program. JA 156-59. Nor is there any evidence that excessive monitoring by the HEC Board is creating an excessive entanglement. There is simply no basis for Davey's claim.

With regard to the Equal Protection Clause, Davey argues that the eligibility requirement in the Promise Scholarship affects a fundamental right and is subject to strict scrutiny. Resp't Br. 44. This Court rejected exactly the same argument in *Maher*, 432 U.S. at 471-74, *Harris*, 448 U.S. at 316-18, and *Regan*, 461 U.S. at 548-51. These

decisions stand for the proposition that the "legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny". *Regan*, 461 U.S. at 549. Accordingly, the Court "declined to apply strict scrutiny and rejected equal protection challenges" in those cases. *Id.* Similarly, in this case, Davey does not have a constitutional right to have the state subsidize his constitutional right to pursue a theology degree.

Although Davey argues that the Promise Scholarship cannot withstand strict scrutiny, he does not seriously argue that the state's decision not to pay for religious instruction to train the clergy is without a rational basis. As this Court observed in *Norwood v. Harrison*, 413 U.S. 455, 462 (1973), even if a state provided state aid to nonsectarian schools like textbooks, it "*could rationally conclude as a matter of legislative policy that constitutional neutrality as to sectarian schools might best be achieved by withholding all state assistance*". (Emphasis added.) There is no basis for Davey's Equal Protection claim.

F. Conclusion

For the foregoing reasons, the judgment of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted.

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October 14, 2003

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02-1315

IN THE

Supreme Court of the United States

GARY LOCKE, ET AL.,

Petitioners,

—v.—

JOSHUA DAVEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IDENTITY AND INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan, membership organization dedicated to preserving the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Washington is one of its statewide affiliates.

Americans United for Separation of Church and State is a national, nonsectarian public interest organization committed to preserving the constitutional principles of religious liberty and separation of church and state.

People for the American Way Foundation is a nonpartisan, education-oriented citizens organization established to promote and protect civil and constitutional rights. It was founded by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty.

Lambda Legal Defense and Education Fund, Inc. is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, the transgendered, and people with HIV or AIDS through impact litigation, education, and public policy work.

Each of the *amici* has appeared before this Court on numerous occasions. Each is committed to the principle of separation between church and state, and to enforcing that

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[1] Letters of consent to the filing of this brief are on file with the Court. No counsel for either party to this matter authored this brief in whole or in part. Furthermore, no persons or entities, other than the *amici* themselves, made a monetary contribution to the preparation or submission of this brief.

principle by respecting the values of both the Free Exercise Clause and the Establishment Clause. Each of the *amici* also supports the proposition that the government may not engage in viewpoint discrimination under the First Amendment. Because all of these doctrines have been raised in this case, its proper resolution is a matter of significant concern to the *amici*, their members and their constituents.

For reasons explained in more detail below, *amici* are persuaded that Washington does not engage in viewpoint discrimination or violate the Free Exercise Clause when it declines to use state tax dollars to subsidize clergy training. *Amici* therefore urge the Court to reverse the contrary decision of the Ninth Circuit.

STATEMENT OF THE CASE

This case asks whether Washington violated the Free Exercise Clause of the First Amendment when it followed a state law forbidding the use of public funds for theology degrees, as applied to an applicant studying to become a Protestant minister. In *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (*Witters II*), this Court held that the federal Establishment Clause does not prohibit a recipient's use of government funds for clergy training as part of an otherwise neutral scholarship program. *Witters II* left open the question posed here: whether the Free Exercise Clause demands that clergy training be included within government scholarship programs notwithstanding a clearly-expressed legislative judgment to restrict funding to secular education. *Id.* at 489-90.

Like many states, Washington includes more specific language in its state constitution regarding religious freedom than is found in the Religion Clauses of the First

Amendment. Instead of providing that the state "shall make no law respecting an establishment of religion, or prohibiting free exercise thereof," U.S. Const. amend. I, Washington's constitution provides in relevant part:

> RELIGIOUS FREEDOM. Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and *no one shall be molested or disturbed in person or property on account of religion*; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. *No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.* . . . No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.

Wash. Const. art. I, § 11 (emphasis added). To ensure that no one will be "molested or disturbed in . . . property" on account of religion, the law governing state-funded college-level financial aid requires that scholarships be awarded "without regard to the applicant's … religion." WASH. REV. CODE § 28B.10.812. To ensure that no public money is appropriated or applied for "religious worship, exercise or instruction," state law mandates that "[n]o aid shall be

awarded to any student who is pursuing a degree in theology." WASH. REV. CODE § 28B.10.814.

Beginning in 1999, the legislature appropriated general funds for the Washington Promise Scholarship. The scholarships subsidize tuition during the first two years of enrollment in accredited institutions of higher education in Washington state, and are available to students from Washington whose family income falls below a specified level, who graduated in the top fifteen percent of their high school class, who are enrolled at least half-time, and who are not pursuing a degree in theology. Recipients may use the scholarship to attend any eligible college or university – even those that are religiously affiliated – so long as the course of study is not a degree in theology.

The statute does not define "theology." However, it is generally understood that this term is intended to reflect the judicial interpretation of the words "religious instruction" found in Wash. Const. art. I, § 11: namely, "instruction that resembles worship and manifests a devotion to religion and religious principles in thought, feeling, belief, and conduct, i.e., instruction that is devotional in nature and designed to induce faith and belief in the student." *Calvary Bible Presbyterian Church v. Bd. of Regents of the Univ. of Wash.*, 436 P.2d 189, 193 (Wash. 1967). Thus, while "theology" encompasses training to become a religious minister, it does not include a course of study in which one learns about one or more religions, such as that pursued in obtaining a comparative religion or religious studies degree. It is with these guidelines in mind that colleges and universities ascertain which of their degree programs constitute training in "theology" under the statute.

Plaintiff Joshua Davey is a Washingtonian who attended Northwest College, an accredited four-year college affiliated with the Assemblies of God (Pentecostal)

denomination of Protestant Christianity. Davey met the financial and high school academic requirements for a Promise Scholarship, but he was not eligible to receive the funds because, as determined by Northwest College, his major in "Pastoral Ministries" was a degree in theology within the meaning of WASH. REV. CODE 28B.10.814. Davey does not dispute that he was pursuing a degree in theology: the Pastoral Ministries major at Northwest College trains students for careers as clergy in Assemblies of God churches. To earn a degree, students must take courses that include, among other things, "Pentecostal (A/G) Doctrines," "Systematic Theology," and "Worship Planning and Design." ER Tab 12 at 23.

Davey filed suit in the Western District of Washington, asserting that failure to provide a state scholarship for his clergy training violated various constitutional rights. The trial court awarded summary judgment to the state defendants on all claims, but in a split decision the Ninth Circuit reversed, holding that Washington had violated Davey's right to free exercise of religion. *Davey v. Locke*, 299 F.3d 748 (9th Cir. 2002). This Court granted *certiorari*.

SUMMARY OF ARGUMENT

By holding that Washington state must either abandon its scholarship program or make it available on an equal basis to students who wish to use public funds for clergy training, the Ninth Circuit proceeded on the assumption that, at least in this context, any state expenditure that is permitted by the Establishment Clause is constitutionally required by the Free Exercise Clause. This Court has never endorsed that view. Instead, the Court has held that so long as they do not violate either the Free

Exercise Clause or the Establishment Clause, states are entitled to exercise their own best judgment on how to structure the complex relationship between government and religion.

This Court has acknowledged that there is, inevitably, some "play in the joints" between the Religion Clauses. *Walz v. Tax Comm. of New York*, 397 U.S. 664, 669 (1970). "The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited." *Id.* Thus, for example, states may provide public bus service to parochial school students without offending the Establishment Clause, *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947), but they are not required to do so by the Free Exercise Clause. *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973), *summarily aff'd*, 419 U.S. 888 (1974). Similarly, states can choose to include parochial schools within a public voucher program, assuming the appropriate safeguards, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), or they can choose not to. *Brusca v. Mo ex rel. State Bd. of Educ.*, 332 F. Supp. 275, 279 (E.D. Mo. 1971), *summarily aff'd*, 405 U.S. 1050 (1972).

For several reasons, the challenged scholarship program in this case fits comfortably within the permissible range of policy choices available to Washington under this Court's decisions. First, public funding for the clergy was a centerpiece of the debates leading to the enactment of the Religion Clauses. Given the nature of that debate, the framers did not likely intend the Free Exercise Clause to be a source of mandatory funding for clergy training. To the best of our knowledge, the Ninth Circuit is the only federal court to have adopted that theory.

Second, Washington has decided that allowing its state scholarships to be applied to clergy training will do more to undermine religious neutrality than to promote it. The Promise Scholarship Program is only available to eligible students who attend accredited institutions in the State of Washington. In practice, that includes very few clergy training programs because most religions train their clergy outside academic settings altogether, in other states, at the graduate level, or – as was the case with Mr. Witters – at non-accredited institutions. The federal Constitution should not be read to prohibit Washington from structuring its Promise Scholarship to avoid the anomalous result of funding clergy training for Mr. Davey, but not for Mr. Witters and his many counterparts in other religions.

Third, even the Ninth Circuit acknowledged that the Promise Scholarship Program developed by Washington is consistent with the standards that this Court has employed to measure a Free Exercise violation. It does not compel respondent to do anything that his religion prohibits or prohibit anything that his religion compels. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988). Nor does it place respondent in the position of relinquishing one constitutional right in order to exercise another. *McDaniel v. Paty,* 435 U.S. 618 (1978). By contrast, where a law simply makes the practice of some religious beliefs more expensive than they would be under a different law, the Court has found no Free Exercise violation. *E.g., Braunfeld v. Brown*, 366 U.S. 599 (1961).

Finally, the decision below rested on a misapplication of this Court's viewpoint discrimination jurisprudence. Clergy training is different in kind, not simply in viewpoint, from the secular fields of study subsidized by the Promise Scholarship. Different religions will offer varying viewpoints about the nature of God, but these viewpoints

taken together form the subject matter of theology. Accordingly, this Court has long recognized that the study of comparative religion is different in kind from the study of theology at issue here. Moreover, this Court's recent public forum decisions in *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98 (2001), *Rosenberger v. Rector of the University of Virginia*, 515 U.S. 819 (1995), and *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), do not indicate otherwise.

The purpose of the viewpoint-neutrality doctrine is to prevent government actions based on hostility to a particular idea, and to assure that government does not skew public debate so as to further its own desired outcome. Washington has not skewed religious discourse by declining to subsidize Davey's clergy training. A state's decision to provide for greater separation of church and state than the federal Establishment Clause, like the decision to provide greater protection for religious activity than the federal Free Exercise Clause, does not convey hostility to religion. While *amici* fully agree with this Court's frequently-stated rule that "ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts," *Rosenberger*, 515 U.S. at 830, there is no such viewpoint discrimination on these facts.

ARGUMENT

I. The Federal Free Exercise Clause and Establishment Clause Leave "Room for Play in the Joints" Allowing States Some Discretion to Select Varying Methods to Guarantee Religious Liberty

Washington excludes theology degrees from its state-funded college scholarships in order to adhere to its state Establishment Clause, even though the federal Establishment Clause as interpreted by *Witters II*, does not require such an exclusion. As the Washington Supreme Court explained: "our state constitution prohibits the taxpayers from being put in the position of paying for the religious instruction of aspirants to the clergy with whose religious views they may disagree." *Witters v. Comm'n for the Blind*, 771 P.2d 1119, 1120 (Wash. 1989) (*Witters III*). If the Free Exercise Clause requires the state to fund all collegiate religious instruction not barred by the Establishment Clause, *Witters II* would resolve the present case. But the federal constitution is not so rigid: it contemplates a range of constitutionally acceptable relationships between church and state. The range is not infinite, but it is broad enough to encompass Washington's approach.

This Court has rejected a strict duality where the Free Exercise Clause would require everything permitted by the Establishment Clause and the Establishment Clause would forbid everything not required by the Free Exercise Clause.

> The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general

> principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts *there is room for play in the joints productive of a benevolent neutrality* which will permit religious exercise to exist without sponsorship and without interference.

Walz, 397 U.S. at 669 (emphasis added). *Accord*, *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987). The Religion Clauses do not fit as tightly as the interlocking pieces of a jigsaw puzzle, and should not become "the Scylla and Charybdis through which any state or federal action must pass in order to survive constitutional scrutiny." *Thomas v. Review Bd.*, 450 U.S. 707, 721 (1981) (Rehnquist, J., dissenting).

The play in the joints identified in *Walz* has allowed this Court to uphold contrasting policy choices relating to state spending for education. For example, *Everson*, 330 U.S. 1, held that the Establishment Clause allowed a state to provide school bus service for children attending private parochial schools. But *Luetkemeyer*, 364 F. Supp. 376, held that a state following the religion clauses of its own constitution could choose not to provide that same service.

> The fact that Missouri has determined to enforce a more strict policy of church and state separation than that required by the First Amendment does not present any substantial federal constitutional question. The Supreme Court has clearly indicated that there is an area of activity which falls between the Establishment Clause and the Free Exercise

> Clause in which action by a State will not violate the former nor inaction, the latter. For example, *Walz v. Tax Commission*, 397 U.S. 664 (1970), concluded that a State may or may not tax church property. "The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." 397 U.S. at 673. Likewise, *Tilton v. Richardson*, 403 U.S. 672 (1972), established that a State may or may not grant funds to church-related schools for construction of buildings for secular use.

364 F. Supp. at 386. Like Missouri in *Luetkemeyer*, Washington has chosen as a matter of state constitutional law not to provide the bus service to parochial schools allowed under *Everson*. *Visser v. Nooksack Valley Sch. Dist. No. 506*, 207 P.2d 198 (Wash. 1949). Other states have made the same choice. *E.g.*, *Epeldi v. Engelking*, 488 P.2d 860 (Idaho 1971); *Spears v. Honda*, 449 P.2d 130 (Haw. 1968); *Matthews v. Quinton*, 362 P.2d 932 (Alaska 1961) (state and federal constitutions would allow public bus transportation to parochial schools, but legislature had not authorized it).

The same pattern appears in the context of state-funded teachers, tutors, or educational assistants working on the grounds of private parochial schools. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993), held that the Establishment Clause did not prohibit Arizona from providing a deaf parochial school student with a state-funded sign language interpreter as part of a religiously-neutral program, and *Agostini v. Felton*, 521 U. S. 203 (1997), held that the Establishment Clause did not prohibit New York from sending special education teachers, among others, to perform secular duties on the grounds of parochial schools.

But, as the Fourth Circuit properly recognized, the Establishment Clause holding in *Zobrest* did not require North Carolina to provide sign-language interpreters to private religious schools; "[w]hile the Establishment Clause determines whether the County may provide certain services in sectarian schools, it does not mandate that the County provide such services." *Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168, 173 (4th Cir. 1995). A Wisconsin court reached the same conclusion, explaining that while *Zobrest* "held that the public provision of a sign-language interpreter for use in a private sectarian school did not violate the Establishment Clause," this "does not mean that the Constitution requires such provision." *Nieuwenhuis v. Delavan-Drien Sch. Dist.*, 996 F. Supp. 855, 864 (E.D. Wis. 1998). The Eighth Circuit ruled likewise, holding that Missouri had no obligation to send state-funded special education teachers to parochial schools, even after the court's decision in *Agostini*. "Missouri's refusal to allow public school educators on private school premises may not be mandated by the First Amendment [under *Agostini*] . . . [b]ut we find nothing in the [IDEA] authorizing federal courts to override such a state policy." *Foley v. Special Sch. Dist. of St. Louis County*, 153 F.3d 863, 865 (8th Cir. 1998).

A similar collection of cases illustrates the government's ability to create or not create voucher programs that subsidize tuition at private religious schools. *Zelman* 536 U.S. 639, held that the Establishment Clause did not bar a Cleveland program that paid tuition at a variety of public and private schools, including parochial schools. But *Brusca*, 332 F.Supp. at 279, held that the Free Exercise Clause did not require a state to subsidize attendance at parochial schools.

> All that is here involved is whether the enactment of some program designed to assist a parent in educating his child religiously with the use of tax-raised money is *mandated* by the First Amendment. On this narrow issue we hold that to the extent the Religion Clauses of the First Amendment do not prohibit such financial aid, they do not require that it be given by the State.

Id. at 279 (original emphasis). As this Court noted in another context, a state is not "constitutionally obligated to provide even 'neutral' services to sectarian schools." *Norwood v. Harrison*, 413 U.S. 455, 469 (1973).

Washington has chosen in the tuition context not to make primary and secondary school voucher payments that might be allowed under the federal Establishment Clause. *Weiss v. Bruno*, 509 P.2d 973 (Wash. 1973) (state constitution does not permit voucher programs that extend to parochial schools); *Gallwey v. Grimm*, 48 P.3d 274, 279-89 (Wash. 2002) (reaffirming *Weiss* rule as applied to K-12 schools). Other states have made the same policy choice, which has been routinely upheld by state and federal courts. *Strout v. Albanese*, 178 F.3d 57, 65 (1st Cir. 1999) (upholding against Free Exercise challenge a state law that reimburses tuition for certain public and private schools but excludes parochial schools); *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127, 133-35 (Me. 1999) (same); *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539, 563 (Vt. 1999) (no Free Exercise violation when Vermont constitutional prohibition on "compelled support" for religion prevents public school districts from reimbursing tuition for parochial schools); *Jackson v. California*, 460 F.2d 282, 283 (9th Cir. 1972) (per curiam) (relying on *Brusca* to hold that Free Exercise Clause does not require California to create a tuition grant program applicable to parochial schools). These cases demonstrate how "a State could rationally conclude as a matter of

legislative policy that constitutional neutrality as to sectarian schools might best be achieved by withholding all state assistance." *Norwood*, 413 U.S. at 462.

This Court's handling of *Witters II* is fully consistent with the "play in the joints" principle. Like the current case, *Witters II* involved Washington's choice not to fund clergy training. The Washington Supreme Court initially held that the exclusion was required by the Establishment Clause and did not violate the Free Exercise Clause. *Witters v. Comm'n for the Blind*, 689 P.2d 53 (Wash. 1984) (*Witters I*). This Court reversed the Establishment Clause decision. *Witters II*, 474 U.S. 481. The Court then remanded, making no ruling on the Free Exercise question briefed by the parties and ruled on below. The Court noted that "[o]n remand, the state court is of course free to consider the applicability of the 'far stricter' dictates of the Washington State Constitution." *Id.* at 489 (citation omitted). The Washington Supreme Court then held that application of scholarship funds for clergy training would violate Wash. Const. art. I, § 11 and withholding the funds would not violate federal Free Exercise or Equal Protection guarantees. *Witters III*, 771 P.2d 1119. This Court denied the plaintiff's subsequent petition for *certiorari*. 493 U.S. 850 (1989). Now that the question has arisen again, this Court should once again acknowledge the freedom of the states to make different policy choices than the federal government.

II. Washington's Choice Not to Apply Tax Money to Clergy Training Falls Within the Realm of Acceptable Relationships Between Church and State

The Court need not in this case attempt to delineate the precise contours of the zone between the Free Exercise and Establishment Clauses. The narrow question posed by this as-applied challenge is whether Washington's decision

not to provide a tax-supported scholarship for clergy training falls within that zone. *Amici* believe the answer is yes.

A. The Founders Did Not Intend for the Free Exercise Clause to Mandate Government-Funded Clergy Training

When evaluating the interaction of the religion clauses, *Walz* considered it significant (but not dispositive) that property tax exemptions for churches had a lengthy history in many American jurisdictions. "It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice . . . [pursued] openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside." 397 U.S. at 678. Washington's decision not to fund clergy training has similarly deep historical roots.

Wash. Const. art. I, § 11 reflects Virginia's famous Act for Establishing Religious Freedom of 1786. Drafted by Thomas Jefferson, the Act incorporates both free exercise and establishment principles:

> *[N]o man shall be compelled to frequent or support any religious worship, place or ministry whatsoever*, nor shall be enforced, restrained, molested or burthened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge or affect their civil capacities.

VA. CODE ANN. § 57-1 (emphasis added). The Virginia Assembly considered these freedoms to be the "natural rights of mankind." *Id.*

The debates leading to the Virginia Act arose from the prospect that general tax money might be used to pay members of the clergy for religious instruction. James Madison's famous "Memorial And Remonstrance Against Religious Assessments" was written in 1785 as a challenge to a "Bill establishing a provision for teachers of the Christian Religion." *See generally Everson*, 330 U.S. at 11-12 and Appendices thereto; Douglas Laycock, *'Nonpreferential' Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 896-99 (1986). Madison's objection to using governmental tax power to support religious instruction was so well received that the original bill was discarded in favor of the Act Establishing Religious Liberty. *Id.* at 897. The Act was specific in its prohibition on tax-supported "ministry," a term that necessarily implies the services of clergy. In its preamble, the Virginia Act took special care to note its objection to paying clergy for religious instruction.

> [T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical, and even the forcing him to support this or that *teacher* of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness, and is withdrawing from the *ministry* those temporary rewards which, proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labors, for the *instruction* of mankind.

VA. CODE ANN. § 57-1 (emphasis added).

A similar debate occurred in Maryland with a similar result. Laycock, 27 WM. & MARY L. REV. at 899. "The votes in Virginia and Maryland show that whenever a choice between nonpreferential aid [to religion] and no aid was squarely posed, Americans in the 1780's voted for no aid." *Id.* "[T]ax support for clerics engaged in education" was one of the primary church-state questions under consideration at the time of the founding. Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 853 (1986). Against this backdrop of high-profile political battles over public funding for religious instruction, the framers surely did not intend for the federal Free Exercise Clause to mandate this controversial action that prominent states had recently chosen to avoid because it encroached on religious liberty.

The Virginia Act was echoed in many state constitutions as the nation grew. Wash. Const. art. I, § 11 was modeled on similar clauses in the constitutions of California (1879), Missouri (1875), Oregon (1857), and Indiana (1851). Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution: A Reference Guide* 25 (2002). Regarding clergy training specifically, ten states adopted even more explicit constitutional language that bars use of state or local funds for the support of any "seminary" or "theological or religious seminary."[2] *See generally*, Frank

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[2] Colo. Const. art. IX, § 7; Idaho Const. art. IX, § 5; Ill. Const. art. X, § 3; Mich. Const. art. I, § 4; Minn. Const. art. I, § 16; Mon. Const. art. X, § 6; Pa. Const. art. III, § 29; Tex. Const. art. I, § 7; Wis. Const. art. I, § 18; Wyo. Const. art. VII, § 8.

R. Kemerer, *State Constitutions And School Vouchers*, 120 EDUC. L. REP. 1 (1997).

The reluctance of some jurisdictions to make payments for religious instruction is heightened in the context of clergy training. As a spiritual leader, educator, interpreter, and public spokesperson, a member of the clergy is "a person at the heart of any religious organization." *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972). "[P]erpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large." *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985). The relationship between a church and its minister is "of prime ecclesiastical concern," *EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272, 1278 (9th Cir. 1982), and "the most spiritually intimate grounds of a religious community's existence," *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 800 (4th Cir. 2000). Because the spiritual and theological preparation of new clergy has such crucial significance to a religion, state-compelled financial support for clergy training raises especially serious free exercise questions for those taxpayers of differing religious beliefs who prefer not to subsidize core religious activity of others.

Federal law acknowledges the unique religious function of the clergy by recognizing, for example, a ministerial exception to employment discrimination laws where no government funding is involved, *e.g., Alicea-Hernandez v. Catholic Bishop*, 320 F.3d 698, 704 (7th Cir. 2003); *Bryce v. Episcopal Church*, 289 F.3d 648, 656 (10th Cir. 2002), and the church autonomy doctrine that prevents civil courts from reviewing church decisions over ordination, assignment, or defrocking of clergy, *Serbian E. Orthodox*

Diocese for U.S. v. Milivojevich, 426 U.S. 696 (1976). It is fully consistent with these doctrines for Washington to decide that "[i]t is not the role of the State to pay for the religious education of future ministers," *Witters I*, 689 p. 2d at 56, and that "our state constitution prohibits the taxpayers from being put in the position of paying for the religious instruction of aspirants to the clergy with whose religious views they may disagree." *Witters III*, 771 p. 2d at 1120.

This lengthy and continuing history wherein a sizable number of American jurisdictions limit their education funding to the secular arena strongly suggests that Washington's laws are permitted by the Religion Clauses. Other than the Ninth Circuit decision in this case, *amici* are unaware of any court ever ruling that a state's choice not to subsidize clergy training offended the Free Exercise Clause.

B. Washington May Ensure That Its Scholarships Do Not Have A Disparate Impact on Different Religions

In practice, a Promise Scholarship without an exception for clergy training would inevitably result in unequal funding for aspiring clergy of different religions. This is because the Promise Scholarship provides tuition subsidies only for persons attending accredited undergraduate colleges or universities in Washington, but only a handful of denominations train their clergy within an accredited undergraduate setting. Buddhist monks train at monasteries, not colleges or universities. Some Jewish colleges offer theological programs at the undergraduate level, but none in Washington state. Even among Protestant denominations, only a few train clergy at the undergraduate level, while the vast majority – including Baptists, Methodists, and Episcopalians – conduct their ministerial training at the graduate level. Of those few Protestant denominations that train clergy at an undergraduate level in Washington, some

do so at non-accredited colleges – such as the Inland Empire School of the Bible attended by Mr. Witters.

Surely, Washington may structure its Promise Scholarship to avoid the anomalous result of funding clergy training for Mr. Davey, but not for Mr. Witters and his many counterparts in other religions. It would be a pyrrhic victory for religious liberty if the Free Exercise Clause were read to bar Washington's effort to ensure that its scholarship program does not have the result in practice of subsidizing some religions but not others. *Cf. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (invalidating a law that forbade animal sacrifice practiced by a single religious sect); *Larson v. Valente*, 456 U.S. 228 (1982) (laws that distinguish among religions are inimical to the Religion Clauses); *Fowler v. Rhode Island*, 345 U.S. 67 (1953) (invalidating conviction under ordinance that would penalize Jehovah's Witness sermon in a park but not religious services of others).

States wishing to provide state-funded scholarships thus face two basic alternatives. Under *Witters II*, they can offer scholarships that extend to clergy training if they choose to do so. As the present case demonstrates, however, this will typically result in very different benefits for different religions and, in may instances, will also violate the relevant state constitutional provisions. Alternatively, states can make the decision that Washington has made here and avoid funding clergy training altogether, even though this arguably results in unequal treatment between religious instruction and secular instruction. The play in the joints doctrine saves states from being damned if they do and damned if they don't. *Walz*, 397 U.S. at 674 ("Either course, taxation of churches or exemption, occasions some degree of involvement with religion.")

C. This Case Involves No Prohibition on Religious Exercise and No Discrimination on the Basis of Religion

Washington's scholarship program does not violate the Free Exercise Clause under any of this Court's settled tests. The most frequently used formulation asks whether the challenged law coerces believers to take action that violates their religion or to refrain from action commanded by their religion. *Lyng*, 485 U.S. at 451. Neither form of coercion is present here. The lack of a Promise Scholarship does not coerce Davey to perform forbidden acts or forego religious training. Furthermore, the Promise Scholarship does not discriminate on the basis of the recipient's religion. Any qualifying student, regardless of religion, may apply a Promise Scholarship to secular fields of study and no student, regardless of religion, may apply one to a degree in theology of any sect. Even the Ninth Circuit majority acknowledged that the ordinary Free Exercise tests favored the state, because the law in question "neither prohibits religious conduct nor does its application turn on the student's religious motivation." 299 F.3d at 753.

Comparing the facts of the present case to the facts of other relevant Free Exercise cases reinforces this conclusion. At one end of the continuum of laws that impact religious exercise are those that impose a criminal penalty on a belief or on the performance of a sacrament. The best example is the religiously-motivated ban on animal sacrifice in *Lukumi*, 508 U.S. at 523. Such laws are unconstitutional, particularly when they target the practices of particular religions. *But see Employment Div. v. Smith*, 494 U.S. 872 (1990) (state may prohibit all use of peyote, including sacramental use). A less invasive burden occurs when a state makes it legally impossible for a believer to exercise certain rights. The archetypal case is *McDaniel*, 435 U.S. at 621, where the

plaintiff had a state constitutional right to seek public office, but as a matter of law he could not exercise that right without first forfeiting his right to be a minister. This sort of law is usually unconstitutional. *But see Bowen v. Roy*, 476 U.S. 693 (1986) (statutory entitlement to poverty benefits may be conditioned on religiously-prohibited disclosure of social security numbers).

In a third type of case, a state law does not condition the exercise of religion on the complete relinquishment of another right, but instead makes religious exercise more expensive than it might otherwise have been. These laws have been upheld. For example, the state in *Braunfeld*, 366 U.S. 599, refused to grant an exemption to Sunday closing laws to Orthodox Jewish merchants whose faith required them also to close their stores on Saturdays. The Court found no Free Exercise violation from the mere fact that a state law "operates so as to make the practice of their religious beliefs more expensive." *Id.* at 605. Religious devotion is sometimes expensive, a fact known to anyone who eats kosher meat, makes the pilgrimage to Mecca, or tithes to a church.

The present case lies on the constitutionally acceptable end of this continuum. Davey faces no threat of criminal prosecution, as did the plaintiffs in *Lukumi* or *Employment Div.* He suffers no legal disability, as did the plaintiffs in *McDaniel* and *Bowen*. To be sure, he will incur expenses that might have been ameliorated by a change in state law but that fact, standing alone, is not a violation of the Free Exercise Clause under *Braunfeld*. In short, Davey faces the common reality that exercising some rights is more expensive than exercising others. Without more, this does not violate the Free Exercise Clause.

III. A State Does Not Engage in Viewpoint Discrimination When It Enacts a Neutral, Non-Sectarian Prohibition Against Funding Any Form of Clergy Training In a State Scholarship Program

Although it decided the case on Free Exercise grounds, the Ninth Circuit majority relied heavily on the viewpoint neutrality doctrine developed under the Free Speech Clause. The majority initially held that the rules governing the Promise Scholarship "lacked neutrality" because they "refer on their face to religion," 299 F.3d at 753. The majority then found viewpoint discrimination in the decision not to fund theology degrees, because it "necessarily communicates disfavor, and discriminates in distributing the subsidy in such a way as to suppress a religious point of view." *Id.* at 756.

Because the aversion to viewpoint discrimination under the Free Speech Clause is justifiably strong, the accusation of viewpoint bias is a powerful rhetorical weapon. But the viewpoint label cannot fairly be attached to the Promise Scholarship, which as discussed above is structured to be scrupulously even-handed among religious viewpoints. The secular fields of study subsidized by Washington are different in kind, not merely in viewpoint, from clergy training. As applied to Davey, the Promise Scholarship program has not distinguished between viewpoints on an otherwise acceptable subject matter, but between distinct subject matters. This is in part because the First Amendment recognizes a constitutionally important difference between teaching about religion and practicing religion.

The Ninth Circuit's first assertion – that a law is necessarily viewpoint-based if it "refers to" religion – cannot withstand scrutiny. "[T]his Court has never required . . . that legislative categories make no explicit reference to religion." *Texas Monthly, Inc. v. Bullock*, 489 US 1, 10 (1989). A

legislature may unquestionably refer to religion in the course of a statute that guarantees religious independence. The Free Exercise and Establishment Clauses themselves refer to religion, so if taking note of religion is always viewpoint discrimination, then these Clauses are in irreconcilable conflict with the Free Speech Clause. This, of course, is not the case.

The more serious viewpoint argument derives from the Ninth Circuit's assertion that public universities in Washington teach "theology courses ... from an historical and scholarly point of view," 299 F.3d at 751, and that the state denies funding only for degrees in "theology taught from a religious perspective," *id.* at 760. The Ninth Circuit's formulation improperly conflates two distinct fields of study under the single term "theology." Consistent with the definition of "religious instruction" in Wash. Const. art. I, § 11, the term "theology" as used in WASH. REV. CODE § 28B.10.814 and as applied to Davey's major in Pastoral Ministries describes the devotional and worshipful study of God. It does not encompass secular, non-devotional courses that teach about religious beliefs and practices. As a factual matter, the record shows that public universities in Washington have no theology departments. Instead, the University of Washington has a Comparative Religion department within the Jackson School of International Studies, and it also offers classes about various world religions in the departments of Near East Studies and Philosophy. ER Tab 21 at 3-12. Degrees in these areas of study are not theology degrees within the meaning of Wash. Rev. Code § 28B.10.814, and the Ninth Circuit erred in describing them as such.

The distinction between theology and the study of religion is not mere semantics; to the contrary, it has long been reflected in constitutional rulings of this Court. In

striking down devotional readings of Bible verses and the Lord's Prayer in public schools, this Court noted:

> it might well be said that one's education is not complete without a study of *comparative religion or the history of religion* and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment. But the exercises here do not fall into those categories.

Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 225 (1963) (emphasis added). Reflecting that distinction, this Court usually uses the term "theology" to mean devotional study, just as Washington does. For example, Justice O'Connor recognized that use of publicly-purchased equipment in the "theology department" of a Catholic school would constitute use for religious instruction. *Mitchell v. Helms*, 530 U.S. 793, 865 (2000) (O'Connor, J., concurring). "Theology" had the same meaning in a case *Mitchell* overruled, *Meek v. Pittenger*, 421 U.S. 349, 364 (1975) (sectarian college "required attendance at classes in theology or at religious services").

The Washington Supreme Court likewise relied on this distinction when it held that a publicly-financed Bible as Literature course at a state university was not "religious instruction," because it was not "instruction that resembles worship and manifests a devotion to religion and religious principles in thought, feeling, belief, and conduct, i.e., instruction that is devotional in nature and designed to induce

faith and belief in the student." *Calvary Bible*, 436 P. 2d at 193. *See also Rosenberger*, 515 U.S. at 826 (it is "an important consideration in this case" that Wide Awake was not a "religious organization," defined as "an organization whose purpose is to practice a devotion to an acknowledged ultimate reality or deity.") For his part, Davey certainly believes that his classroom experience at Northwest College constituted intrinsically religious activity, or else he would not claim that the lack of a state subsidy violated his right to free exercise of religion.

Once the confusion of terminology is resolved, it becomes evident that the Ninth Circuit misapplied this Court's repeated statements that "[s]peech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint." *Good News* 533 U.S. at 112. *Accord Rosenberger*, 515 U.S. 819; *Lamb's Chapel* 508 U.S. 385. This rule does not resolve the present case. In each of the limited public forum cases it was possible to identify a subject matter that the plaintiff wished to address from a religious viewpoint. For example, the films in *Lamb's Chapel* discussed child-rearing from a religious perspective. By contrast, a degree in theology is not a discussion of a non-religious subject from a particular viewpoint. While theology degree programs of different denominations undoubtedly offer varying viewpoints about the nature of God, taken together they form the overall subject matter of theology.

Rosenberger noted how the religious-perspective-on-a-secular-subject formulation has meaning only in limited circumstances.

> It is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought. The nature of our origins and destiny and their dependence upon the existence of a divine being have been subjects of philosophic inquiry throughout human history.

515 U.S. at 831. To be sure, this Court found that the particular exclusions involved in *Rosenberger*, *Lamb's Chapel*, and *Good News* classified on the basis of viewpoint, but this is not necessarily the case every time the topic of religion receives separate treatment. Lower courts have recognized that differential treatment of religion may sometimes be a distinction of subject matter and sometimes a distinction of viewpoint, depending on context. "Religion may be either a perspective…or may be a substantive activity in itself. In the latter case, the government's exclusion of the activity is discrimination based on content, not viewpoint." *Pfeifer v. City of West Allis*, 91 F. Supp. 2d 1253, 1267 n.6 (E.D. Wis. 2000) (citation omitted). The difference between a subject matter distinction and a viewpoint distinction depends on the facts. To draw a non-religious analogy, a law barring all Democrats from a ballot could be a forbidden viewpoint distinction in a general election, but an acceptable subject matter distinction during a Republican primary. The notion that "excluding religion as a subject or category from a forum always constitutes viewpoint discrimination … mischaracterizes the holding in *Rosenberger*." *DiLoreto v. Downey Unified Sch. Dist.*, 196 F.3d 958, 969 (9th Cir. 1999).

The Ninth Circuit's misapplication of the viewpoint doctrine does not further the doctrine's purposes. As explained in *Rosenberger*, viewpoint discrimination is "an egregious form of content discrimination," 515 U.S. at 829, because it skews the marketplace of ideas in favor of the government's preferred position. By contrast, "viewpoint-

neutral restrictions directed against all speech relating to an entire subject do not have the same sort of skewing effect on 'the thinking process of the community' as restrictions directed specifically against speech taking a particular side in an ongoing debate." Geoffrey R. Stone, *Restrictions of Speech Because of Its Content*, 46 U. CHI. L. REV. 81, 108 (1978). This critical distinction was overlooked by the Ninth Circuit when it held that declining to fund clergy training "communicates disfavor" or constitutes "state disapproval of the religious pursuits" of aspiring clergy. 299 F.3d at 756. Just the opposite is true. Properly understood, Washington's policy is motivated by and furthers an interest in neutrality among religions and the promotion of religious liberty for all taxpayers. Indeed, Washington's constitutional prohibition on state funding for religious instruction is found directly adjacent to clauses ensuring "absolute freedom of conscience in all matters of religious sentiment, belief and worship," and guaranteeing that "no one shall be molested or disturbed in person or property on account of religion." Wash. Const. art. I, § 11. The framers of the Washington Constitution had no hostility to religious viewpoints. Robert F. Utter and Edward J. Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 HASTINGS CONST. L. Q. 451, 477 (1988). Separating the secular from the religious in this context does not reflect animus toward religion, but scrupulous respect for it.

This respect is further reflected by the fact that Washington provides greater protection to free exercise than the federal Constitution does when generally applicable laws are alleged to have burdensome impact on religious activity. *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174, 185-189 (1992) (state constitution does not follow *Employment Div.*). *See also City Chapel Evangelical Free Inc. v. City of S. Bend*, 744 N.E.2d 443 (Ind. 2001) (same);

Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857 (Minn. 1992) (same). The combination of strong state Establishment Clauses with strong state Free Exercise Clauses indicates that these states do not harbor hostility against religion or a desire to suppress religious ideas. Affirming the states' ability to grant their citizens greater religious liberty under state Establishment Clauses would also affirm the states' ability to pursue greater religious liberty under state Free Exercise Clauses.

Amici of course agree with the principle, consistently repeated by this Court, that "ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts." *Rosenberger*, 515 U.S. at 830. *See also Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 583 (1998) (in making optional grants to artists, government may not rely on "considerations that, in practice, would effectively preclude or punish the expression of particular views"); *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 548 (1983) (government may not "discriminate invidiously in its subsidies in such a way as to 'aim [] at the suppression of dangerous ideas'," quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959) and *Speiser v. Randall*, 357 U.S. 513, 519 (1958)). If a state made a formal decision to subsidize clergy training for Protestants but not for Catholics, the viewpoint bias would not vanish simply because it was expressed as the absence of a subsidy. For the reasons described above, however, there is no viewpoint discrimination in this case. The cases examining viewpoint discrimination in funding are therefore inapplicable.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be reversed.

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In the

SUPREME COURT OF THE UNITED STATES

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, ET AL.,

Petitioners,

v.

JOSHUA DAVEY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

Brief Of The States Of Vermont, Massachusetts, Missouri, Oregon And South Dakota And Of The Commonwealths Of The Northern Mariana Islands And Puerto Rico

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INTEREST OF THE AMICI CURIAE

The *Amici Curiae* ("Amici States" or "States") are all sovereign States or Commonwealths whose Constitutions and statutes attempt to balance the competing interests of allowing persons freely to practice their religious beliefs, while avoiding public funding of those beliefs and practices. Each State seeks to strike this balance differently, but all *Amici* States have a vital interest in ensuring the continuing viability of their own laws concerning religious liberty.

The Court's decision in this case could affect numerous constitutional provisions and laws from around the country. A number of States impose greater restrictions on the provision of public monies to religious pursuits or institutions than is required by the Establishment Clause. Similarly, many States have given religious groups exemptions from State laws to accommodate their religious practices – even when the Free Exercise Clause would not mandate the accommodation. Such approaches to religious freedom, developed to reflect the needs, values and peoples of each State, fall within the sphere of permitted government action that lies between the Free Exercise and Establishment Clauses.

INTRODUCTION AND SUMMARY OF ARGUMENT

Both before and after adoption of the First Amendment, State Constitutions have insisted on a careful separation between church and state. This separation is grounded, not in hostility toward religion, but in a strong desire to protect religious liberty. As De Tocqueville observed over one hundred and fifty

years ago, religion flourishes under this framework. *See* 1 Alexis De Tocqueville, *Democracy in America* 319 (Knopf 1945) (attributing America's "peaceful dominion of religion . . . mainly to the separation of church and state"). The question presented in this case is whether State Constitutions will continue to have a role in establishing the dividing line between church and state.

Washington's decision to follow its Constitution and not fund scholarships for theological degrees is consistent with the Free Exercise Clause of the First Amendment. While Respondent Davey has a right to pursue that degree, cases such as *Harris v. McRae*, 448 U.S. 297 (1980) and *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), firmly establish that he has no right to do so at public expense. The Promise Scholarship program imposes no State-created barrier to Davey's free exercise of religion, nor does it coerce Davey into violating his religious beliefs. He remains able to pursue a theology degree at his own expense, and he may qualify for a Promise Scholarship to pursue a secular degree at another institution. The State's subsidy program leaves him in no worse position than he would have been in had the State not funded any scholarships.

The Ninth Circuit improperly relied upon "public forum" cases decided under the Free Speech Clause to invalidate Washington's law. States do not create public forums whenever they establish programs that subsidize certain activities while not subsidizing others. The heightened scrutiny of public forum analysis is applicable in the subsidy context only when

the government intends the funding program to create a forum for expression. The Promise Scholarship program was not designed to create such a forum. Moreover, if Washington's program were subject to public forum scrutiny, it would call into question governmental funding schemes from across the country. The Constitution does not require such a result. Washington's scholarship program is simply a funding mechanism. Absent the creation of an actual public forum, decisions concerning the allocation of scant public resources should be left to the democratically-elected representatives of the people.

The most troubling aspect of the Ninth Circuit's ruling is that it federalizes and eliminates any meaningful State role in setting church-state policy. Under the lower court's construction of the First Amendment, that which is not prohibited by the Establishment Clause is mandated by the Free Exercise Clause. This is not the law. Between the two Religion Clauses lies an important zone where individual States may come to differing conclusions as to the best means of attaining religious freedom. Some State Constitutions place stricter limits on the distribution of public monies for religious endeavors than those set forth in the Establishment Clause. These Constitutions envision a strong separation between church and state, not as a form of discrimination, but as a means of assuring the continuing vitality and independence of both spheres. In the same regard, many States permit religious groups greater exemptions from general State laws than may be required under the Free Exercise Clause. Based on their unique histories and experiences, States

take diverse paths to religious liberty. Unless there is actual interference with religious activities or beliefs, or the establishment of religion, those approaches do not violate the First Amendment.

ARGUMENT

I. Washington's Promise Scholarship Program Does Not Violate The First Amendment

Washington's decision to follow the dictates of its Constitution and not extend public subsidies to those seeking theology degrees is in harmony with the First Amendment. U.S. Const. amend I. Washington's Promise Scholarship program erects no State barrier to Respondent Davey's study of religion, and he remains able to pursue his theology degree at his own expense. The State's refusal to pay for his studies simply does not burden Davey's constitutional rights.

A. Consistent With The Free Exercise Clause, A State May Decline To Subsidize The Pursuit Of Theology Degrees

This appeal is governed by the Court's rulings holding that the government is not required to subsidize citizens' exercise of their constitutional rights. *Harris v. McRae*, 448 U.S. 297 (1980), upheld Congress's decision not to provide Medicaid monies for medically-necessary abortions, even though it extended such funding for costs related to childbirth. *Id.* at 315-18. While a woman's right to an abortion is secured by the Constitution, the Court held that a woman has no concomitant right to obtain government funding for the procedure. *Id.* at 316 ("it simply does not follow that a

woman's freedom of choice comes with a constitutional entitlement to the financial resources to avail herself of the full range of protected choices"). The Medicaid program left McRae "with at least the same range of choice" as she would have had if the government had funded no healthcare costs. *Id.* at 317. The government's decision to fund childbirth costs imposed no government burden on a woman's right to choose. The Court concluded that "[a]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation." *Id.* at 316; *accord Maher v. Roe*, 432 U.S. 464, 474-76 (1977); *see DeShaney v. Winnebago Co. Dep't of Social Servs.*, 489 U.S. 189, 196 (1989) ("no affirmative right to governmental aid").

Most on point is *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983). There, the Court upheld a statute that denied tax-exempt status -- a form of government subsidy -- to non-profit corporations that engaged in substantial lobbying, but exempted veterans' organizations from the law. The Court rejected the notion that Congress's choice to subsidize one group's lobbying and not another's impinged upon any First Amendment interest. Appellant Taxation With Representation ("TWR") remained free to engage in lobbying; "Congress has merely refused to pay for the lobbying out of public monies." *Id.* at 545. Further, TWR could continue to lobby *and* retain tax-exempt status, so long as it performed the lobbying through a separately-incorporated entity. *Id.* at 544 n.6.

The Court expressly refused to subject Congress's discretionary funding decisions to strict scrutiny:

> This is not the law. Congress could, for example, grant funds to an organization dedicated to combatting teenage drug abuse, but condition the grant by providing that none of the money received from Congress should be used to lobby state legislatures. Under *Cammarano*, such a statute would be valid. Congress might also enact a statute providing public money for an organization dedicated to combatting teenage alcohol abuse, and impose no condition against using funds obtained from Congress for lobbying. The existence of the second statute would not make the first statute subject to strict scrutiny.

Id. at 548-49.

The sole limitation the Court set on such funding choices was that the congressional decision could not be "aimed at the suppression of dangerous ideas." *Id.* at 550 (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959)). Otherwise, the Court's precedents establish that the government has broad discretion to make funding decisions.

Washington's Promise Scholarship fits comfortably within the constitutional confines of *Harris* and *Regan*. While Davey unquestionably has a right to pursue a theology degree, he has no corollary right to obtain

that degree with public assistance, even if the State provides support for other studies. As in *Harris*, Washington has erected no State barrier to his pursuit of such a degree or his free exercise of religion. He remains in no worse position than if the State had not offered scholarships to pursue any course of study. As Justice Douglas opined:

> The fact that the government cannot exact from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a sum of money, the better to exercise them. For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.

Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring); *Lyng v. Northwest Indian Cemetery Ass'n*, 485 U.S. 439, 451 (1988) (noting same).

Washington's decision not to fund theology studies mirrors governmental choices made in numerous contexts. States may provide grants for study at in-state schools and not for out-of-state institutions. They may enact scholarships for medical degrees but not for law degrees. At most, Washington's law fails to reduce the monetary cost of Davey's studies. But, such a consequence presents no Free Exercise problem. *Braunfield v. Brown*, 366 U.S. 599, 605 (1961) (Sunday closing laws that made exercise of religion "more expensive" did not violate Free Exercise Clause)

(plurality opinion); *see Maher,* 432 U.S. at 474 (government failure to reduce cost of obtaining abortion does not burden right to choose).

In addition, Davey can both obtain the benefits of the scholarship and pursue his theology degree. He may seek one degree with his scholarship monies while pursuing a theology degree at a different school utilizing his own funds. This is closely analogous to *Regan,* where TWR could maintain its tax-exempt status if it incorporated a separate entity to perform its lobbying activities. As in *Regan*, Davey can obtain the benefits of the program and exercise his religious beliefs. That such a choice may be difficult or less financially attractive, does not present a concern of constitutional dimension.

B. Washington's Constitutionally-Grounded Policy Against Funding Theology Degrees Is Aimed At Furthering Religious Liberty, Not At Suppressing "Dangerous Ideas"

Washington's scholarship program is not designed to "suppress dangerous ideas." *Regan*, 461 U.S. at 550. The Promise Scholarship program exempts theology degrees to comply with Washington's Constitution, which contains heightened protections against the use of public funds to finance religious educations. Wash. Const. art. I, sec. 11; *Davey v. Locke*, 299 F.3d 748, 758 (9th Cir. 2002). Such a goal is not constitutionally suspect.

Laws passed to ensure the separation of church and state are not aimed at the suppression of religion.

Countless decisions of the Court have relied upon the Establishment Clause to invalidate laws, not with a goal of squelching religion, but out of a legitimate desire to maintain church-state separation. *See, e.g., School Dist. of Abbington Twp. v. Schemp*, 374 U.S. 203, 217-21 (1963). Such a separation has long been considered to be beneficial to both the government and religion. *Id.* at 226-27; *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 212 (1948) (Denying public schools the ability to teach religion does not "manifest a governmental hostility to religion . . . . [T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."). Viewing Washington's law as an effort to oppress religion would be in conflict those decisions.

Moreover, the Promise Scholarship program is blind toward religious belief and exercise. Scholarship recipients remain free to engage in religious practices and speech, and to offer religious viewpoints on issues. They can participate in religion classes or attend religious colleges. A recipient could even be a minister, rabbi or priest and still obtain a Promise Scholarship. The only thing a recipient can not do is use public funds to obtain a degree in religion. Nothing about the Promise Scholarship program has the purpose or effect of stamping out religion. Indeed, the Washington Constitution secures its citizens with "[a]bsolute freedom of conscience in all matters of religious sentiment, belief and worship." Wash. Const. art. I, sec. 11. Whether or not observance of the State's constitutional mandate presents a compelling interest,

cf. Widmar v. Vincent, 454 U.S. 263, 276 (1981), it certainly presents a legitimate basis for the funding limitation involved in this case.

C. The Promise Scholarship Program Does Not Burden Or Penalize Davey's Exercise Of His Constitutional Rights

The Ninth Circuit construed the scholarship program as burdening Davey's Free Exercise rights only because it lost sight of the distinction between a funding decision and a law directly restricting religious liberty. The rulings relied upon by the lower court, *McDaniel v. Paty*, 435 U.S. 618 (1978) and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 510 (1993), both involved direct and substantial burdens placed by the government upon First Amendment rights. They are inapposite to this case.

The Tennessee law invalidated in *McDaniel v. Paty* disqualified ministers from seeking elective office. The Court found that Paty had a constitutional right both to be a minister and to run for office. Tennessee's law effectively precluded him from exercising both of those rights. As a result, the State had erected a direct, legal barrier to Paty's exercise of his constitutional rights. *See also Torcaso v. Watkins,* 367 U.S. 488 (1961) (Maryland law requiring elected officials to swear oath attesting to their belief in God violated the Free Exercise Clause).

The opposite is true here. As argued above, Davey has no constitutional right to obtain public funding for his private educational pursuits. In addition,

Washington created no barrier to his exercise of his rights. Davey remained eligible both to pursue a theology degree with private funds and to pursue a secular degree with scholarship funds. As in *Harris*, Davey was in no worse position than if the Promise Scholarships had never been offered.

City of Hialeah is even further afield. There, the city passed a law criminalizing the ceremonial slaughter of animals when not done for the purpose of food consumption. 508 U.S. at 527-28. This constituted an outright, governmental prohibition of the ritual sacrifice of animals, which is a practice of the Santeria faith. *Id.* at 524-25; *Strout v. Albanese*, 178 F.3d 57, 65 (1st Cir.) (noting same), *cert. denied*, 528 U.S. 931 (1999). The difference between such a direct and invidious constraint on religious liberty and the funding program at issue in this case is stark. *Braunfield*, 366 U.S. at 605-06 (law requiring "financial sacrifice in order to observe their religious beliefs . . . is wholly different than when the legislation attempts to make a religious practice itself unlawful") (plurality opinion).

Likewise, the Ninth Circuit mistakenly concluded that Washington's scholarship program amounts to an impermissible "penalty" on Davey's decision to pursue a theology degree. The lower court's invocation of cases arising in the area of unemployment benefits in support of that conclusion, misconstrues those precedents. In *Sherbert v. Verner; Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707 (1981); and *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987), the Court "invalidated state

unemployment compensation rules that conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his religion." *Employment Div. v. Smith,* 494 U.S. 872, 883 (1990).[1] The parties in those cases were forced to violate their religious beliefs in order to obtain the benefits of the program. Such governmental "coercion" was the critical factor underlying the unemployment cases. *See, e.g., Hobbie*, 480 U.S. at 141 (government may not condition benefit so as to put "substantial pressure on an adherent to modify his behavior and to violate his [religious] beliefs"); *cf. Lyng*, 485 U.S. at 450 (laws "which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, [do not] require government to bring forward a compelling justification").

Such coercion is patently lacking in this case. As the Court explained in *Harris,* had the government refused to provide *all* Medicaid benefits to women who obtained abortions, it would likely be an unconstitutional penalty on the right to choose. *Harris*, 448 U.S. at 317 n.19. Instead, the government program at issue in *Harris* constituted "simply a refusal to subsidize certain protected conduct." *Id.; see Regan*, 461 U.S. at 545 (law does not "deny TWR any *independent benefit* on account of its intention to lobby" (emphasis added)). Thus, Washington plainly could not deny all public benefits to Davey based solely upon his pursuit of a theology degree. Barring that type of

[1] As the *Smith* Court also noted, those decisions have now largely, if not exclusively, been cabined within the context of unemployment benefits. 494 U.S. at 883-85.

independent burden, however, the Promise Scholarship program is on all fours with *Harris* and *Regan*. Its limited scope may "confront some applicants for benefits with choices, but in no sense does it affirmatively compel [applicants], by threat of sanctions, to refrain from religiously motivated conduct or to engage in conduct they find objectionable for religious reasons." *Bowen v. Roy*, 476 U.S. 693, 703 n.14 (1986) (opinion of Burger, C.J., Rehnquist & Powell, JJ.).

The government has greater discretion in its funding decisions than it does when it wields its power directly. *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587-88 (1998). While it may not prohibit Davey from pursuing a religion degree, it need not provide public monies to subsidize his endeavor. As in *Harris* and *Regan*, Washington's Promise Scholarship program and the constitutional provision that compelled it, do not impermissibly burden Davey's constitutional rights.

II. Public Forum Cases Decided Under The Free Speech Clause Are Inapplicable To This Funding Program

This Court's rulings concerning the regulation of public forums do not counsel a different result. The Ninth Circuit's reliance upon cases such as *Rosenberger v. Rector & Visitors of the Univ. of Virginia,* 515 U.S. 819 (1995), to support subjecting the Promise Scholarship program to heightened scrutiny, was misplaced. 299 F.3d at 755-57. A government-spending program does not fall under the *Rosenberger* line of cases unless the system is designed to create a

public forum for expression. That intent is lacking in this instance.

A. Washington's Funding Program Does Not Create A Public Forum

Rosenberger employed public forum analysis only after determining that the funding scheme created by the University of Virginia had been designed with the specific intent of establishing an expressive forum. The University's Student Activities Fund ("SAF") paid for the printing and other expenses of numerous student groups. *Id.* In other words, the University gave "public money to student groups who wished to publish." *United States v. American Library Ass'n,* 123 S.Ct. 2297, 2305 (2003) (plurality opinion). Based upon the stated purposes of the SAF, the Court concluded that the University had created a *de facto* public forum designed to "encourage a diversity of views from private speakers." 515 U.S. at 834.

Other cases from this Court confirm that a funding plan is not subject to public forum scrutiny unless the program is designed to create a forum for private expression. In *Board of Regents v. Southworth*, 529 U.S. 217 (2000), the Court utilized public forum/ viewpoint neutrality review in upholding the constitutionality of a student activity fee charged by the University of Wisconsin. It applied public forum analysis only after concluding that the purposes for which the University had created the student activity fee mirrored those of the University of Virginia in *Rosenberger*. "The University of Wisconsin exacts the fee at issue for the sole purpose of facilitating the free and open exchange of ideas by, and among, its students." 529 U.S. at 229.

Outside of the student activity monies in *Rosenberger* and *Southworth* – which were obtained to create public forums for diverse private expression – the Court has been chary of applying public forum analysis in the context of government spending programs. *National Endowment for the Arts v. Finley* rejected *Rosenberger's* applicability to a federal program that subsidized certain art projects. Based upon the program's focus upon artistic excellence, it was not designed, as was the University of Virginia's in *Rosenberger*, to "indiscriminately 'encourage a diversity of views from private speakers.'" 524 U.S. at 586 (quoting *Rosenberger*, 515 U.S. at 834). The Court held:

> So long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities. Congress may "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." 500 U.S., at 193, 111 S.Ct., at 1772. In doing so, "the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other." *Ibid.*

Id. at 588; *see Maher,* 432 U.S. at 475.

Most recently, five members of the Court agreed that the federal government did not create a public forum by offering subsidies to libraries to help them offset the costs of Internet access. *See American*

Library Ass'n, 123 S.Ct. at 2305 (plurality opinion); *id.* at 2310 (Breyer, J., concurring in the judgment). To create a public forum, the government "must make an affirmative choice to open up its property for use as a public forum." *Id.* at 2305; *see Santa Fe Independent School Dist. v. Doe*, 520 U.S. 290, 303 (2000). The Plurality stated:

> A public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves. It provides Internet access, not to "encourage a diversity of views from private speakers," but for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality.

Id. (internal citation omitted). The same may well be said of the Promise Scholarship program.[2]

[2] *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001), is not to the contrary. There, the government created a program to fund legal representation for indigent litigants seeking welfare benefits. Congress refused to extend that funding to counsel who argued against the validity of existing welfare laws. The Court concluded that Congress was not able, consistent with the First Amendment, to pay for legal representation but limit the legal theories and advice that might be given during that relationship. While the Court analogized to public forum cases, it acknowledged that such decisions were not controlling in examining government subsidies. 531 U.S. at 543. Moreover, its ultimate holding was based primarily on the Court's conclusion that the subsidy restriction was designed to "insulate the Government's interpretation of the Constitution from judicial challenge." *Id.* at 548. As such, the funding scheme was organized to suppress "ideas thought inimical to the Government's own interest." *Id.* at 549. That government subsidy programs, including Washington's, cannot be manipulated to "suppress dangerous ideas" is beyond cavil. *See Regan*, 461 U.S. at 458.

Consequently, the Court's public forum precedents do not provide controlling authority over the issue presented in this appeal.[3] Instead, the Promise Scholarship program should be upheld under the traditional case law dealing with the constitutionality of governmental subsidies.

B. Applying The Heightened Scrutiny Of Public Forum Decisions Would Call Into Question Numerous Federal And State Programs

If government-spending programs such as Washington's are subject to heightened scrutiny as public forums, numerous laws on both the federal and state levels could be called into doubt. For example, federal funding programs often preclude the use of public monies for religious or partisan political purposes. The Tribally Controlled Colleges or Universities Grants Program provides that its funds "shall not be used in connection with religious worship or sectarian instruction." 25 U.S.C. §1803.[4] Likewise,

As argued *supra*, at Section I(B), the Promise Scholarship program has no such aim or purpose.

[3] The Amici States urge the Court not to expand public forum analysis to new areas such as scholarship programs. Several Justices have noted in a different setting that the Court should be "wary of the notion that a partial analogy in one context, for which we have developed doctrines, can compel a full range of decisions in such a new and changing area." *Denver Area E. Telecommunications Consortium v. F.C.C.*, 518 U.S. 727, 749 (1996) (opinion of Breyer, J.), *quoted in American Library Ass'n*, 123 S.Ct. at 2305 n.3; *see Rosenberger* 515 U.S. at 852 ("Grand Unified Theory []may turn out to be neither grand nor unified")(O'Connor, J., concurring).

[4] *See also* 20 U.S.C. §1062(c)(1) (higher education grants may not be made under this chapter for any educational program, activity or service related to sectarian instruction or religious worship, or provided by a school or department of divinity"); 20 U.S.C. §1066c(c) (federal loan guarantees can not be used in connection with "any educational program, activity or

the National Youth Anti-Drug Media Campaign prohibits its funds from being used for "partisan political purposes." 21 U.S.C. §1802.

State laws also set similar limits and boundaries on the uses of public funds. At least ten States refuse, as does Washington, to permit public scholarship funds to be used to finance religious studies at colleges and universities.[5] Some States decline to extend public

service related to sectarian instruction or religious worship or provided by a school or department of divinity or to an institution in which a substantial portion of its functions is subsidized in a religious mission"); 20 U.S.C. §1068(e) (educational grants "may not be used . . . for a school or department of divinity or any religious worship or sectarian activity"); 25 U.S.C. §3306 (Higher Education Tribal Grants may not be used "for study at any school or department of divinity or for any religious worship or sectarian activity"); 42 U.S.C. §5001(a)(2) (grants for elderly may not include "projects involving the construction, operation, or maintenance of so much of any facility used or to be used for sectarian instruction or as a place of worship"); 42 U.S.C. §9858k(a) (child care block grants may not be "expended for any sectarian purpose or activity, including sectarian worship or instruction").

[5] Ala. Code §16-33A-1(4)(f) (2002) (an eligible student is "not enrolled and does not intend to enroll in a course of study leading to an undergraduate degree in theology or divinity"); La. Rev. Stat. Ann. § 1675(5) ("A person shall be eligible for consideration for a scholarship if . . . [h]e shall not be a major in religious studies or theology."); Mich. Comp. Laws §390.994(2) ("A grant shall not be made under this act to a student who is enrolled in a program of study leading to a degree in theology, divinity, or religious education."); Mo. Ann. Stat. §173.215(1.6) ("no award shall be made under sections 173.200 to 173.230 to any applicant who is enrolled, or who intends to use the award to enroll, in a course of study leading to a degree in theology or divinity."); N.J. Stat. Ann. §18A: 71B-20(b) ("A student who is enrolled in a course leading to a degree in theology or divinity shall not be eligible for a tuition aid grant."); N.Y. Educ. Law §661(6) ("no such awards shall be used to obtain professional instruction in theology"); Or. Rev. Stat. §348.186(3) ("The Oregon Student Assistance Commission may not award an Oregon Achievement Grant to a qualified student who is enrolled in a course of study required for and leading to a degree in theology, divinity or religious education."); S.C. Code Ann. §59-113-20(e) (a qualified applicant "is not enrolled in a course of study leading to a degree in theology, divinity, or religious education"); S.D. Codified Laws

monies to partisan political endeavors. *See, e.g.*, Tenn. Code Ann. §43-20-212 (board created to promote soybean products can not use funds for political purposes); *Schulz v. State*, 654 N.E.2d 1226, 1230 (N.Y) (New York Constitution precludes using public funds for partisan causes), *cert. denied*, 516 U.S. 944 (1995).

All of these funding programs are the product of Constitutions or statutes and, thus, reflect the will of the citizenry. Absent an attempt to stamp out "dangerous ideas," decisions of legislatures as to how best and most appropriately to apportion limited public resources should be respected. Importing public forum analysis in this context is unnecessary, unwarranted and would suggest the unconstitutionality of many federal and state programs. The Constitution does not require such a result.[6]

Codified Laws §13-55B-1(2) ("Qualified student . . . is not enrolled in a course of study leading to a degree in theology or religious education[.]"); Wis. Stat. Ann. §39.30(2)(d) ("No grant shall be awarded to members of religious orders who are pursuing a course of study leading to a degree in theology, divinity or religious education.").

[6] If the Court's public forum decisions do provide guidance in this case, they support the constitutionality of Washington's law. Not every government forum must be open, without limitation, to all types of expressive activity. Even where some expression occurs in the context of a forum, the forum may be "nonpublic." *Cornelius v. NAACP Legal Defense Fund, Inc.*, 473 U.S. 788, 802-03 (1985). Or, the government may create a public forum "for a limited purpose such as use by certain groups or for the discussion of certain topics." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983) (citation omitted). Given the limited purposes and availability of the Promise Scholarship, it should be considered either a nonpublic forum or, at most, a limited public forum. In either event, so long as it is reasonable and does not discriminate based on viewpoint, confining such "a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics." *Rosenberger*, 515 U.S. at 829. Washington's program does not discriminate based on viewpoint, it simply restricts the use of public funds to secular degrees.

III. States Have Important Roles In Establishing Church-State Policies That Fall Between The Free Exercise And Establishment Clauses

States have a vital interest in setting appropriate limits on the use of public monies to support religion and in the proper accommodation of religious practices. States have come to differing conclusions on how best to balance these competing concerns to achieve religious liberty. The Ninth Circuit's ruling unduly impinges upon the ability of States to make their own decisions regarding how best to attain that equipoise. In essence, its decision holds that if funding of sectarian studies is not prohibited by the Establishment Clause, it is mandated by the Free Exercise Clause. This approach has not been, and should not be, recognized by the Court.

A. The Ninth Circuit Ruling Eliminates The Constitutional Separation Between The Religion Clauses

Following the Ninth Circuit's rationale, a State would never be able to favor a greater separation between church and state than that set by this Court

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Rosenberger specifically noted that the Virginia program did not exempt "religion" as a subject matter -- an exclusion the Court intimated may be permissible under its forum analysis. *Id.* at 830-31. Instead, it excluded the religious viewpoint from the discussion of issues already included within the forum. *Id.; see Good News Club v. Milford Central School*, 533 U.S. 98, 107 (2001) (barring religious groups from forum on morals and character development is viewpoint discrimination). Washington's program is just the opposite. It excludes the subject matter of theology degrees, while permitting recipients to espouse religious perspectives on any subject included within the forum. Scholarship programs frequently limit eligibility to recipients who pursue certain courses of study, such as the sciences or teaching. If a scholarship is deemed a forum, then these kinds of eligibility limitations rightly define the subject-matter parameters of the forum.

with regard to Establishment Clause. In the Ninth Circuit's judicial world, State decisions concerning religious liberty are either mandated or prohibited; no space is left between the Free Exercise Clause and the Establishment Clause for States to enact reasonable legislation. Such a rule federalizes and eliminates any meaningful role for the States in establishing church-state policy. Ira C. Lupu & Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, And The Next Round Of Constitutional Battles*, 78 Notre Dame L. Rev. 917, 965 (2003). Moreover, it is directly at odds with prior decisions of this Court that recognize a separation between the Religion Clauses.

In *Walz v. Tax Comm'n*, 397 U.S. 664, 668-69 (1970), for example, the Court held:

> The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other. . . . [W]e will not tolerate either governmentally established religion or governmental interference with religion. Short of those extremely proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and interference.

Accord Luetkemeyer v. Kaufman, 364 F. Supp. 376, 386 (W.D. Mo. 1973) ("The Supreme Court has clearly indicated that there is an area of activity which falls between the Establishment Clause and the Free Exercise Clause in which action by a state will not

violate the former nor inaction, the latter."), *aff'd*, 419 U.S. 888 (1974); *see Tilton v. Richardson*, 403 U.S. 672, 677 (1971) (attempting to define the "boundaries of the neutral area between these two provisions [the Religion Clauses] within which the legislature may legitimately act").

The Court's decisions on permissible accommodations of religion further compel the conclusion that an important constitutional separation exists between the Religion Clauses. *Walz*, itself an accommodation case, stated that: "the limits of permissible state accommodation to religion are by no means coextensive with the non-interference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself." 397 U.S. at 673. *Accord Smith*, 494 U.S. at 890 ("But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required."); *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987) (government may "'accommodate religious practices and that it may do so without violating the Establishment Clause'" (quoting *Hobbie*, 480 U.S. at 144-45)); *see Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (government may confer benefits upon religious groups under certain circumstances even if not required by the Free Exercise Clause); *Lyng*, 485 U.S. at 452-54 (rejecting mandatory exemption under Free Exercise Clause but stating: "[n]othing in our opinion should read to encourage governmental insensitivity to the religious needs of any citizen . . . and should not discourage [the government] from accommodating religious practices").

If, as the Ninth Circuit's rule would have it, there is no room between the Religion Clauses for legislation concerning religion, cases such as those cited above would not have charged legislatures with the task of determining whether to accommodate the religious beliefs of their citizens. Contrary to the opinion below, this Court's precedents grant States the ability to draft reasonable legislation that negotiates the channel between the Free Exercise Clause and the Establishment Clause in order to attain religious freedom.

B. States Must Retain The Ability To Craft Constitutional Provisions And Laws That Fall Between The Demands Of The Religion Clauses

The unique histories and experiences of the States have resulted in various and distinct approaches to achieving religious freedom. Some States have interpreted their Constitutions to be co-extensive with the federal Religion Clauses. *See People v. Falbe*, 727 N.E.2d 200, 207 (2000) (establishment provisions same).[7] As shown below, some States choose to afford greater protections against the establishment of religion than does the Establishment Clause, while some mandate greater accommodation for religion than would be required under the Free Exercise Clause. Such divergence is reflected in State Constitutions and

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[7] *Accord Kotterman v. Killian*, 972 P.2d 606, 622 (Ariz.) (establishment clauses same), *cert. denied*, 528 U.S. 921 (1999); *Appeal of Springmoor, Inc.*, 498 S.E.2d 177, 180 (N.C. 1998) (adopting law of both Religion Clauses); *State v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 761 (Tenn. Ct. App. 2001) (free exercise principles the same); *see also Jabr v. Rapides Parish School Bd.*, 171 F. Supp. 2d 653, 659 n.5 (W.D. La. 2001) (Louisiana and federal establishment clauses identical).

laws throughout the county. And it is a diversity that is to be cherished.

For example, at least nineteen States have Constitutions that either expressly or through judicial interpretation afford a greater protection against the use of government monies to support religious activities than does the Establishment Clause.[8] Based on such provisions, State programs respecting religion sometimes fare differently under State Constitutions than they would under the First Amendment.[9] While this Court has found no Establishment Clause violation in government plans that pay for textbooks loaned and student transportation provided to parochial schools -- *Board of Education v. Allen*, 392 U.S. 236 (1968); *Everson v. Board of Educ.*, 330 U.S. 1 (1947) -- State courts have rejected such programs as a matter of State constitutional law. *See, e.g., California Teachers Ass'n v. Riles*, 632 P.2d 953, 963-64 (Cal. 1981) (textbooks).[10]

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[8] *See* Cal. Const. art. XVI, §5; Del. Const. art. X §3; Fla. Const. art. I, §3; Ga. Const. art. I, §2, ¶VII; Haw. Const. art. X, §1; Idaho Const. art. IX, §5; Ky. Const. §189; Mass. Const. art. XLVI, §2; Mo. Const. art IX, §8; Mont. Const. art. X, §6; Nev. Const. art. XI, §10; N.M. Const. art. XII, §3; N.D. Const. art. VIII, §5; Okla. Const. art. II, §5; Or. Const. art. I, §5; S.D. Const. art. VI, §3, art. VIII, §16; Tex. Const. art. I, §7; Vt. Const. ch. 1, art. 3; Wyo. Const. art. I, §19.

[9] In the somewhat analogous context of aid to parochial schools, one commentator has categorized State Constitutions into three types: restrictive against aid (17 states), permissive in favor of aid (14 states) and uncertain (19 states). Frank Kemerer, *The Constitutional Dimension of School Vouchers*, 3 Tex. F. on C.L. & C.R. 137 (1998) (collecting and analyzing constitutional provisions concerning religious aid); Frank Kemerer, *State Constitutions and School Vouchers*, 120 Educ. L. Rep. 1 (1997) (same).

[10] *Accord Matthews v. Quinton*, 362 P.2d 932, 942-43 (Alaska) (transportation), *cert. denied*, 368 U.S. 517 (1961); *Opinion of the Justices*, 216 A.2d 668, 671 (Del. 1966) (transportation); *Spears v. Honda*, 449 P.2d 130, 138-39 (Haw. 1969) (transportation); *Fannin v. Williams*, 655 S.W.2d 480, 483-84 (Ky. 1983) (textbooks); *Paster v. Tussey*, 512 S.W.2d 97, 103-04 (Mo. 1974) (textbooks), *cert. denied sub nom. Reynolds v. Paster*, 419 U.S. 1111 (1975); *Board of Educ. v. Antone*, 384 P.2d 911, 912-13 (Okla. 1963) (transportation); *Dickman v. School Dist. No. 62C*, 366 P.2d 533, 545 (Or. 1961) (textbooks), *cert. denied sub nom. Carlson v. Dickman*, 371 U.S. 823 (1962); *McDonald v. School Bd.*, 246 N.W.2d 93, 96 (S.D. 1976) (textbooks).

The States discussed above erect a higher wall between church and state than exists under the federal Constitution, not as a form of discrimination, but as a reflection of their peoples' belief that government support of religious activities is, ultimately, damaging both to religion and government. *See McCollum*, 333 U.S. at 212. They also seek to address a significant governmental concern over compelling citizens to subsidize religious beliefs and practices with which they may stridently disagree. *See Everson*, 330 U.S. at 9, 13 ("early settlers came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches"). As the Washington Supreme Court has noted, the religion clauses of the Washington Constitution:

> have not been the work of the enemies, but of the friends of religion. It is not that the men who framed and the people who adopted these constitutional enactments were wanting in reverence for the Bible, and respect and veneration for the sublime and pure morality taught therein, but because they were unwilling that any avenue should be left open for the invasion of the right of absolute freedom of conscience in religious affairs; because that they were unwilling that

> any man should be required, directly or indirectly, to contribute toward the promulgation of any religious creed, doctrine or sentiment to which his conscience did not lend full assent.

State ex rel. Dearle v. Frazier, 173 P. 35, 35 (Wash. 1918) (quoting 1 Op. Att'y Gen. 142 (1891)).

Vermont is a telling case in point. Vermont's Constitution is of colonial vintage; it was adopted when Vermont became an independent republic in 1777. Article 3 of the Vermont Constitution provides that "no person ought to, or of right can be compelled to . . . support any place of worship . . . contrary to the dictates of conscience." Vt. Const. Ch. I, art. 3. This provision was taken from the earlier Constitution of the Commonwealth of Pennsylvania, which had

> "established the broadest religious liberty in colonial America . . ., and [t]he colony incorporated into its laws . . . a refusal to provide public tax support for churches and clergy." Curry, *supra*, at 75. The constitutional non-support language goes back to the 1682 Frame of Government of the commonwealth. *See id.*

Chittenden Town School Dist. v. Dep't of Educ., 738 A.2d 539, 556 (Vt. 1999) (quoting T. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (1986)).

Drawing on the text of Article 3, its historical contexts and decisions construing analogous constitutional provisions from other States, the Vermont Supreme Court concluded that Article 3 was

not co-extensive with the Establishment Clause. 738 A.2d at 549 ("payment scheme that does not offend the First Amendment is [not] necessarily consistent with Article 3"). This led the Court to find that a school-funding system that afforded public tuition grants to students who could choose to use them at sectarian schools -- without regard to whether the funds would be used for religious education -- would violate Article 3. 738 A.2d at 562-63; *see also Holmes v. Bush*, 2002 WL 1809079 (Fla. Cir. Ct. 2002) (Florida's Constitution does not permit tuitioning plan to include sectarian schools).

The Court predicted that such a system would pass muster under the First Amendment because the private choice of the student vitiated any Establishment Clause concern, but held that: "We cannot conclude, however, that parental choice has the same effect with respect to Article 3." 169 Vt. at 343, 738 A.2d at 563. The concurring opinion explained the distinction by noting that the Establishment Clause is written in terms of prohibiting the government from establishing religion while Article 3 grants special protection to citizens to ensure their tax dollars are not used to finance religion. 169 Vt. at 346-47, 738 A.2d at 565 (Johnson, J., concurring).[11]

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[11] A number of courts have found no Free Exercise problem with State programs that do not permit public monies to be spent on religious education, even when such funding is available for private, non-sectarian education. *Chittenden Town School Dist.*, 738 A.2d at 563; *see Strout*, 178 F.3d at 65 (upholding tuitioning statute that did not permit public monies to be used for attendance at religious schools); *Bagley v. Raymond School Dep't*, 728 A.2d 127, 134-35 (Me.) (same), *cert. denied*, 528 U.S. 947 (1999); *see also McCarthy v. Hornbeck*, 590 F. Supp. 936, 943-44 (D. Md. 1984) (State not required to fund transportation for parochial schools); *Epeldi v. Engelking*, 488 P.2d 860, 866-67 (Idaho 1971), *cert. denied*, 406 U.S. 957 (1972) (same).

States could rightly conclude that forcing such payments might breed animosity and resentment toward religion. Such a concern is neither insignificant nor constitutionally suspect. *See* Abner Greene, *Why Vouchers are Unconstitutional and Why They're Not*, 13 Notre Dame J.L. Ethics & Pub. Policy 397, 401-02 (1999) (compelling persons to pay for religious schools akin to forced speech); Kathleen Sullivan, *Parades, Public Squares and Voucher Payments: The Problems of Government Neutrality*, 28 Conn. L. Rev. 243, 256 (1996) (noting danger of forcing citizens to fund religious messages with which they disagree); Michael McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 Harv. L. Rev. 989 (1991) (requiring taxpayers to fund religions they do not accept "is understood to violate their religious conscience").[12]

Just as some States diverge from the Establishment Clause, other State Constitutions and laws grant greater accommodations for religious practices than is required by the Free Exercise Clause. For example, the Minnesota Supreme Court has consistently held that "Minnesotans are afforded greater religious liberties against governmental action under the state

[12] That Washington's relevant constitutional provision is a so-called Blaine Amendment does not counsel a different result. While the original impetus for some such provisions may have been a desire to restrict public monies from supporting Catholic schools, the adopted amendment here has a broader and non-discriminatory scope. *See Frazier*, 173 P. at 35; Derek Green, *Note, Does Free Exercise Mean Free State Funding? In Davey v. Locke, The Ninth Circuit Undervalued Washington's Vision Of Religious Liberty*, 78 Wash. L. Rev. 653, 680 n.271 (2003) (Washington's constitutional prohibition on religious funding reflects a "lack of hostility toward religion generally" (quoting Robert Utter and Edward Larson, *Church State On The Frontier: The History Of The Establishment Clause In The Washington Constitution*, 15 Hastings Const. L.Q. 451, 472 (1988))).

constitution than under the First Amendment of the federal constitution." *State v. Hershberger,* 462 N.W.2d 393, 397 (Minn. 1990). Based on such reasoning, the Court refused to adopt this Court's ruling in *Employment Division v. Smith,* and developed its own standard to determine whether general State laws adversely affect religion. 462 N.W.2d at 396-98. Indeed, a number of States have rejected the *Smith* approach in favor of greater protections for free exercise under State Constitutions. *See, e.g., Humphrey v. Lane*, 728 N.E.2d 1039, 1045, *cert. denied*, 531 U.S. 263 (Oh. 2000).[13] Such efforts are also reflected in State statutes. *See, e.g., Vineyard Christian Fellowship of Evanston v. City of Evanston*, 250 F. Supp. 2d 967, 993-94 (N.D. Ill. 2003) (Illinois Religious Freedom Restoration Act, 775 Ill. Comp. Stat. Ann. 35/15, enacted to establish a more searching analysis than required by *Smith*).[14]

A decision upholding the Ninth Circuit's ruling would bring the constitutionality of the State Constitutions and laws described above into question. More significantly, it would remove States from the policy debate concerning the proper role of government *viz* religion. States take diverse paths to religious

[13] *Accord Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 280-81 (Alaska), *cert. denied*, 513 U.S. 979 (1994); *Attorney General v. Desilets*, 323, 636 N.E.2d 233, 236 (Mass. 1994); *Snyder v. Murray City Corp.*, No. 20010203, 2003 WL 1860524, at *4 (Utah Apr. 11, 2003); *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174, 185-88 (Wash. 1993); *State v. Miller*, 549 N.W.2d 235, 239 (Wis. 1996); *see United States v. Boyll*, 774 F. Supp. 1333, 1339 (D.N.M 1991) (collecting State laws exempting religious usage from statutes criminalizing use of peyote).

[14] Of course a State can transgress the Constitution if it offers too great an accommodation of religion. *See Board of Educ. v. Grumet*, 512 U.S. 687 (1994) (granting municipality-like status to sect created an establishment of religion).

freedom. Within reasonable limits, they should be able to establish a higher wall between church and state than does the Establishment Clause, without offending Free Exercise principles. Likewise, reasonable State efforts to afford greater protections to the exercise of religious beliefs than is required by the Free Exercise Clause should not be considered to be the establishment of religion or discrimination against "non-religion." So long as the constitutional provisions or laws rest in the permissible area between the two Religion Clauses, States must be granted the opportunity to come to their own conclusions as to how best to achieve religious liberty.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

GARY LOCKE, MARCUS GARSPAD, BOB CRAVES, JOHN KLACIK, *et al.*,

Petitioners,

v.

JOSHUA DAVEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN JEWISH CONGRESS, ON BEHALF OF ITSELF, THE AMERICAN FEDERATION OF TEACHERS, THE AMERICAN JEWISH COMMITTEE, AND THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS

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AMICI CURIAE BRIEF of the AMERICAN JEWISH CONGRESS, AMERICAN FEDERATION OF TEACHERS, AMERICAN JEWISH COMMITTEE, and the BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS

Interest of the *Amici*

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, political, religious and economic rights of American Jews. It has taken an active role in challenging the provision of government aid to religious institutions.

* * *

The American Federation of Teachers, AFL-CIO ("AFT") is a national labor union which represents over 1.2 million members who work in public schools, community colleges, universities, state government and health care. Over 120,000 AFT members work in higher education. Since its founding in 1916, AFT has filed numerous amicus briefs in this Court on First Amendment, as well as civil and labor rights issues. We continue that tradition with this case.

* * *

The American Jewish Committee ("AJC"), a national human relations organization with over 125,000 members and supporters and 33 regional chapters, was founded in 1906 to protect the civil and religious rights of Jews. A staunch defender of church-state separation as the surest guarantor of religious liberty for all Americans, AJC

supports the right of the State of Washington to maintain a stricter separation than that required by the federal Constitution and to decline to fund the study of theology in keeping with that stricter separation.

* * *

The Baptist Joint Committee on Public Affairs ("BJC") is a religious liberty organization, serving fourteen cooperating Baptist conventions and conferences in the United States. BJC deals exclusively with religious liberty and church-state separation issues and believes that vigorous enforcement of both the Establishment and Free Exercises Clauses is essential to religious liberty for all Americans. In accordance with this understanding of the Constitution, the BJC joined a petition seeking rehearing of the *Employment Division v. Smith* decision and an *amicus* brief on behalf of the prevailing party in the *Good News Club v. Milford Central School District* case.

We join as amici in this case because we believe that the decision below misconstrues the constitutional principles that protect religious liberty. BJC believes that the Free Exercise Clause protects religious practice from governmental interference, but contemplates no right of state subsidization of it. Further, we disagree with the lower court's dismissive approach toward the State's interest in upholding its own constitutional ban against the support of religion and the characterization of that interest as hostility toward religion.

SUMMARY OF ARGUMENT

1. The decision below inverts the question in financial aid to religion cases from "is the aid permissible" to "is the aid compulsory." In the course of so holding, the Ninth Circuit cast into doubt the viability of the constitutions of over half the states.

2. This Court, in cases such as *Norwood v. Harrison*, 413 U.S. 455, 462 (1973), *Wheeler v. Barrera*, 417 U.S. 402 (1974), *Leutkemeyer v. Kaufmann*, 364 F.Supp. 376 (W.D. Mo. 1973), aff'd, 419 U.S. 888 (1974) and *Brusca v. Missouri ex rel. State Bd. of Educ.*, 332 F.Supp. 275 (E.D. Mo. 1971), aff'd, 405 U.S. 1050 (1972), acknowledged that states were free to deny aid to religious school students that they provided to secular school students. Some of these decisions (*i.e.*, *Leutkemeyer*) came over dissents making the same 'discrimination against religion' argument as Respondent makes here.

3. These results are a product of this Court's recognition that the religion clauses of the First Amendment are not an either/or proposition–that is, it is not the case that whatever is not forbidden (or mandated) by one clause is mandated (or forbidden) by the other. There is "play in the joints," interstitially, for legislators to widen or contract the gap between religion and state without violating the Free Exercise Clause, precisely as the legislature may expand the scope of religious accommodation without violating the Establishment Clause.

4. This Court recognized the existence of "play in the joints" in *Walz v. Tax Comm'n*, 397 U.S. 664 (1970).

State and federal courts (including the Washington Supreme Court) have likewise applied the concept to both Establishment and Free Exercise claims.

5. Congress, too, has repeatedly enacted statutes recognizing the validity of "play in the joints," including "play" which denies aid to religious institutions and their students, even though the aid would not violate the Establishment Clause. These statutes include the Elementary and Secondary Schools Assistance Act, 20 U.S.C. § 6320(e); the National School Lunch Program Act, 42 U.S.C. § 1756(b); the recently enacted No Child Left Behind Act, 20 U.S.C. § 7217(a)(d)(i) and *id.* at § 7882; and the first "charitable choice" law, 42 U.S.C. § 604(a)(k).

6. "Play in the joints" is appropriate where:

(i) religious groups are not relegated to outlaw status, as by denial of basic protective services;

(ii) there is no discrimination between religious groups;

(iii) the policy falls into an area of reasonable doubt, not where the clear import of the federal constitution bars the practice in question, and the concerns the state addresses are real, not (as was the case in *McDaniel v. Paty*, 435 U.S. 618 (1978)), prophylactic rules averting illusory harms.

7. Given the constitutional roots of a ban on aid to religious education, and the rule that the bare denial of a subsidy to a constitutionally protected activity is not an unconstitutional penalty, *U.S. v. American Library Ass'n*, 123 S.Ct. 2297 (2003), *Rust v. Sullivan*, 500 U.S. 173 (1991), *Regan v. Taxation With Representation*, 461 U.S. 540 (1983),

Washington's refusal to fund theology majors falls within a gray area and is constitutional.

8. Where "play in the joints" is the appropriate rule, compelling interest analysis is inapposite. None of the cases on which the judgment below rests are inconsistent with this conclusion.

9. The Free Exercise Clause is written in terms of what the "government cannot do to the individual, not what the individual can exact from government," *Lyng v. Northwest Indian Protection Ass'n*, 485 U.S. 439 (1988). *Sherbert v. Verner*, 374 U.S. 398 (1963) (whose author, Justice Brennan, joined in the summary affirmance in *Leutkemeyer*), did not involve the transfer of funds to any religious institution. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), involved a rare effort at regulatory suppression of a particular church.

Rosenberger v. Rector, 515 U.S. 819 (1995), was by its terms limited to non-tax funds, to an organization this Court said was not "a religious institution as that term as used in our case law." Moreover, unlike here, in *Rosenberger* the state's interest was in creating a robust forum for speech, not in subsidizing individuals seeking an education. A state's refusal to subsidize theology training is well within the scope of the reasonable. At the least, states ought to be free, on this disputed ground, to experiment. *Grutter v. Bollinger*, 123 S.Ct. 2325 (2003).

10. Washington is not seeking to suppress religious ideas. A student is not denied a subsidy for taking religion courses or attending a college whose curriculum is permeated with religious ideas. The State only withholds a

subsidy for theological training as such; it has not committed religious ideas to an ideological gulag.

11. While there is no doubt that Washington's constitutional provision emerged as part of the 19th century controversy over funding Catholic education, it does not follow that it was impermissibly motivated by anti-Catholicism. To be sure, pure anti-Catholic bigotry existed, and played a role in the controversy. However, the overriding fact was that the Catholic Church in the 19th century was officially opposed to church-state separation. These views were stated in widely known Papal encyclicals (one labeled separation "absurd," and another, "insanity"). The idea of separation was condemned by the Syllabus of Errors (No. 55). Opponents of this ordering of church-state relations were entitled to forestall the possibility of a drastic reordering of the American church-state settlement with stringent anti-aid provisions without being condemned, retroactively, as bigots.

ARGUMENT[1]

I. HISTORY AND PRECEDENT ARGUE AGAINST CONSTITUTIONALLY MANDATED FINANCIAL SUBSIDIES

The modest tone of the judgment below belies its broad sweep. In invalidating a single aspect of one state's college aid program, the court below almost certainly invalidated constitutional provisions in at least 29, and

1. No person, organization or corporation other than the named *amici* and their counsel assisted in, or contributed to, the preparation or filing of this Brief.

perhaps as many as 37, states,[2] numerous federal and state statutes, considered opinions of this, and other federal and state courts, and settled political and public understandings.

The court below did not respect the settled tradition of allowing states limited discretion to determine whether to fund religious enterprises even where that funding is compatible with the federal Establishment Clause. Instead, it discerned in the First Amendment an unyielding uniform rule of equal funding of secular and religious beneficiaries. All contrary state constitutional provisions were likely invalidated in one fell swoop, as relics of a by-gone era of anti-religious animus, notwithstanding that numerous Justices of this Court–including several now sitting–were, and are, similarly minded.

If the judgment below is affirmed, the question in financial aid to religion cases will no longer be, as it has been, "is this aid permissible or forbidden?" It will be instead "is this aid forbidden or required?" That fundamental restructuring of the legal framework for deciding Establishment Clause cases would startle generations of judges, lawyers, politicians and academics.

A. Precedents Of This Court Grant States Discretion Not To Fund Religious Education

Norwood v. Harrison, 413 U.S. 455, 462 (1973), noted that the Constitution did not require states to provide

2. I.C. Lupu and R.W. Tuttle, Government Partnerships With Faith-Based Providers (2002) at 37; S.K. Green, Stars in the Constitutional Constellation (1993)

religious schools or their students all the aid the Establishment Clause permits.

> Even assuming . . . that the Equal Protection Clause might require state aid to be granted to private non-sectarian schools in some circumstances–health care or textbooks ... a State could rationally conclude as a matter of legislative policy that constitutional neutrality as to sectarian schools might best be achieved by withholding all state assistance.

That 'rational conclusion' violates the First Amendment under the decision below.

In *Wheeler v. Barrera*, 417 U.S. 402 (1974), this Court wrestled with Missouri's administration of the Elementary and Secondary Schools Assistance Act (ESSA), which required an equitable expenditure of federal funds to benefit religious school students. The statute also obligated federal authorities to respect restrictive state constitutional provisions (such as those of Missouri). Pronouncing the Establishment Clause issues difficult, this Court insisted the case was not ripe, as it might be possible to accommodate both statutory requirements. On the decision below, however, there was no conflict to resolve. Missouri's restrictive constitutional provision unconstitutionally discriminated against religion.

Decisively on point are the decisions of three-judge courts in *Leutkemeyer v. Kaufmann*, 364 F.Supp. 376 (W.D. Mo. 1973), aff'd, 419 U.S. 888 (1974) (bus transportation); *Brusca v. Missouri ex rel. State Bd. of Educ.*, 332 F.Supp. 275, 276 (E.D. Mo. 1971), aff'd, 405 U.S. 1050 (1972) (ban on aid

to religious schools); and *DiCenso v. Robinson*, 316 F.Supp. 112 (D. R.I. 1970), aff'd *sub nom*, *Lemon v. Kurtzman*, 403 U.S. 621 (1971), cases discussed only in passing by the court below. Each squarely presented the question presented here–whether the Free Exercise or Equal Protection Clause requires a state to provide aid permissible under the federal Establishment Clause.

Brusca held neither Clause did so because, "to the extent the Religion Clauses of the First Amendment do not prohibit ... financial aid, they do not require that it be given ...." *Leutkemeyer* reached the same conclusion although noting that most states rejected Missouri's astringent attitude toward religious school aid. In *Leutkemeyer* and *Brusca*, plaintiffs cited *Sherbert v. Verner*, 374 U.S. 398 (1963), for the identical proposition that Respondents here cite *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993): that the exclusion of religious school students from a program of aid available to secular school students is an impermissible penalty on religious observance.

Judge Gibson, a member of the *Leutkemeyer* court, authored a dissent presaging the opinion below. The summary affirmance in *Leutkemeyer* came over the dissents of two Justices urging similar claims. 419 U.S. 888. Affirmances in *Leutkemeyer*, *Brusca* and *DiCenso* enjoy full precedential weight, *Hicks v. Miranda*, 422 U.S. 332 (1975). They should not have been overridden by the court below. *Agostini v. Felton*, 521 U.S. 203, 237 (1997). *Brusca*, *Leutkemeyer* and *DiCenso*, moreover, were decided in the early 1970's amidst a vigorous national debate and much litigation over aid to religious schools in the name of equal

treatment and in the wake of *Board of Educ. v. Allen*, 392 U.S. 236 (1968).

A review of this Court's decisions upholding aid to parochial schools shows that they habitually frame the issue as whether the Establishment Clause "prevent[s] a state from extending the benefits of state laws to all citizens," not whether the Constitution requires the extension of such assistance. See, e.g., *Allen*, *supra*, 392 U.S. at 242, citing *Everson v. Bd. of Educ.*, 330 U.S. 1, 17 (1947). Not a word in either *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), *Mitchell v. Helms*, 530 U.S. 793 (2000), *Agostini v. Felton*, *supra*, or *Mueller v. Allen*, 463 U.S. 388 (1983) so much as hints that legislatures are required by the Constitution (contrary to *Norwood*) to extend equipment subsidies or tuition benefits available to secular school students to those attending religious schools. The repeated framing of the issue in a way that assumes legislative discretion reflects a widespread, if not explicitly stated, understanding that legislatures retain a measure of discretion to narrow or widen the gap between church and state.

B. The Court Has Recognized "Play In The Joints" In The Religion Clauses

The refusal to impose an either/or straitjacket on the Religion Clauses is no accident, nor an artifact of decisions which are abandoned hulks on the sea of the law. Rather, the existence of limited discretion in legislatures to fund or not fund religious enterprises reflects this Court's consistent approach to the Religion Clauses.

Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970), rejected the claim that a real property tax exemption for

churches established religion.[3] In the course of explaining why this Court observed:

> Mr. Justice Harlan expressed something of this in his dissent in *Sherbert v. Verner* ... saying that the constitutional neutrality ... "is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation." .... The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. .... [T]here is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

397 U.S. at 668, 669 (citations omitted) (emphasis added).

If there were no room for "play in the joints," and if all religion specific rules were subject to compelling interest analysis as the court below held, *Davey v. Locke*, 299 F.3d 748, 758-60 (9th Cir. 2002), then the discretionary religious exemptions invited by *Employment Division v. Smith*, 494 U.S. 872, 890 (1990) would be unconstitutional on the

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3. The exemption of religious institutions is not constitutionally mandated. *Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378 (1990).

theory that they prefer to draw religious lines without compelling justification.

That position is not trivial. It was advanced by Professor Phillip Kurland[4] and urged by at least two Justices of this Court–Justice Harlan in *Welch v. U.S.*, 398 U.S. 333, 356 (1970) (concurring opinion)[5] and Justice Stevens in *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (concurring opinion).[6] Yet even as it held that the Free Exercise Clause does not require exemption from neutral laws, this Court left states free to adopt discretionary exemptions applicable to religious objectors only without requiring a showing of compelling interest. See *Employment Division v. Smith*, *supra*; *Board of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687 (1994); *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

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4. P. Kurland, Religion and the Law: Of Church and State and the Supreme Court (1962).

5. But see Justice Harlan's concurrences in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *School District of Abington Twslip. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg and Harlan, J.J.).

6. Several courts, reading *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), just as literally as the court below, have questioned or invalidated religion-specific exemptions. *Congregation Kol Ami v. Abington Township*, 309 F.3d 120 (3rd Cir. 2002); *Madison v. Riter*, 240 F.Supp.2d 566 (W.D. Va. 2003), appeal pending (4th Cir. 2003); *Al-Ghashiyah v. Wis. Dep't of Corrections*, 250 F.Supp.2d 1016 (E.D. Wis. 2003), appeal pending (7th Cir. 2003). The fundamental error of these courts is in ignoring "play in the joints," and imposing a rigid either/or framework on the First Amendment.

If "play in the joints" exists for legislative protection of free exercise beyond any constitutional mandate, then there can, and should, be "play in the joints" with regard to non-establishment as well.

C. State Courts Acknowledge "Play In The Joints"

The existence of "play in the joints" reflect a long-standing constitutional tradition of states enforcing stricter limits on the subsidization of religion than required by the federal Constitution. Concomitantly, and despite plausible countervailing Establishment Clause concerns, see pp. 9-10, *supra*, several states enforce stricter free exercise limits on government than does the federal Constitution. See, *e.g.*, *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990).

The federal Constitution permits states to provide transportation *(Everson v. Bd. of Educ.*, 330 U.S. 1 (1947)) and textbooks (*Board of Educ. v. Allen*, 392 U.S. 236 (1968)) to parochial school students. A majority of states provide such aid. Others, however, do not, rejecting claims that their more restrictive church-state policies violate federal Free Exercise or Equal Protection guarantees.[7] Similarly, while

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7. As to school busing, in addition to cases cited in Point I.A., *supra*, see, *e.g.*, *Healy v. Independent School Dist.*, 1991 U.S. Dist. LEXIS 20958 (D. Minn. 1991); *Franc v. South Bend Community School Corp.*, 480 N.E.2d 261 (Ind. App. 1985); *McCarthy v. Hornbeck*, 590 F.Supp. 936 (D. Md. 1984); *Cook v. Griffin*, 47 A.D.2d 23, 364 N.Y.S.2d 632 (App. Div. 4th Dept. 1975). As to textbooks, see, *e.g.*, *Fannin v. Williams*, 655 S.W.2d 480 (Ky. 1983); *California Teacher's Ass'n v. Riles*, 29 Cal.3d 794, 176 Cal. Rptr. 300, 632 P.2d 953 (1981); *Paster v. Tussey*, 512 S.W.2d 97

the federal Constitution permits issuance of revenue bonds for religious institutions, *Steele v. Industrial Development Bd.*, 301 F.3d 401 (6th Cir. 2002), some states forbid them under their own constitutions. *Board of County Comm'rs v. Idaho Health Facilities Auth.*, 531 P.2d 588 (Idaho 1974).

Washington State's constitution illustrates "play in the joints." It provides greater protection for both free exercise and non-establishment than does the federal Constitution. "[T]he Washington courts have interpreted [the state constitution] to provide broader protection for free exercise of religion than its federal counterpart, yet simultaneously to provide a greater separation of church and state." R.F. Utter and H.D. Spitzer, The Washington State Constitution: A Reference Guide (2002).

In *Witters v. State Comm'n for the Blind*, 112 Wash.2d 363, 771 P.2d 1119 (1989), the Washington Supreme Court held that, even though granting vocational aid to a theology student would not violate the federal Establishment Clause, *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986), it would not deny any federally protected right to enforce a stricter state non-establishment rule.[8]

(Mo. 1974); *Elbe v. Yankton Indep. Sch. Dist.*, 372 N.W.2d 113 (S.D. 1985). For additional cases in various contexts, see *Snyder v. Charlotte Public School Dist.*, 123 Mich. App. 56, 333 N.W.2d 542 (Ct. of App. 1983) (dual enrollment); *Valencia v. Blue Hen Conference*, 476 F.Supp. 809 (D. Del. 1979) (athletic league).

8. Almost simultaneously with the decision below, the Washington Supreme Court, *State ex rel. Gallwey v. Grimm*, 146 Wash.2nd 445, 48 P.3d 274 (2002), recast its reading of the state constitution so that it is now closer to the rule of *Zelman v.*

This diversity of opinion is unsurprising. Justices of this Court are divided on where to mark the boundary between church and state when government offers financial aid to religious institutions. Considerations of federalism, and modesty in not assuming that one's judgment about debatable subjects is correct, cautions against reading the federal Constitution to homogenize church-state relationships to a monochromatic federal standard.

D. Congress Is Cognizant Of "Play In The Joints"

In addition to insisting on "play in the joints," *Walz* teaches another relevant lesson–that in interpreting the First Amendment a "page of history" is worth more than volumes of logic, 397 U.S. at 676. A particularly "strong case" must be made out to invalidate practices which are long-standing and widespread. On the evidence of long-standing congressional practice, that burden cannot be sustained here.

Simmons-Harris, supra. To the extent that the rule attacked here was justified under a reading of the state constitution *Gallwey* rejects, it may be appropriate to certify to the Washington Supreme Court, Rev. Code of Washington § 2.60, the question of whether the challenged regulation is still required to comply with the Washington constitution.

Davey registered for a double major, one of which was secular and would have sustained a scholarship independently of his theology major. The court below seems to have paid no attention to this fact, which suggests a narrower basis for decision: that Davey was penalized for having an additional religious major, even though his secular major alone would have sustained his eligibility for a grant.

Congress has repeatedly acknowledged the constitutional legitimacy of differing state constitutional policies regarding the funding of religious education, a policy entitled to substantial weight. ESSA, enacted on the heels of *Sherbert*, *supra*, was the first federal statute providing educational benefits to religious school students. L. Pffefer, Church, State and Freedom (2d ed. 1967) at 601-604.

Although the Act aided religious school students, Congress did not pre-empt more restrictive state constitutional provisions. It required federal officials to provide aid directly if "a local education agency is prohibited by law," 20 U.S.C. § 6320(e), from serving religious school students. The legislative history makes plain that in not preempting state law, Congress was respecting the validity of restrictive state church-state policies.[9] Just last year Congress included similar provisions in the No Child Left Behind Act, 20 U.S.C. § 7217a(d)(i) and 20 U.S.C. § 7882 (2002).

Similarly, the National School Lunch Program Act, 42 U.S.C. § 1756(b)[10] subsidizing religious, as well as public, schools, excused states from certain matching fund requirements with regard to religious schools if compliance would violate state law.

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9. S. Rep. 146, 89th Cong., 1st Sess. (1965), reprinted in 1965 U.S.C.C.A.N. 1446, 1468-69. See also the colloquy, 111 Cong. Rec. H.R. 5756-5758 (March 24, 1965); *id.* at 5734 (remarks of floor manager Rep. Powell).

10. First enacted in 1964, after *Sherbert v. Verner*, *supra*.

The first charitable choice law, guaranteeing the right of sectarian social service providers to compete equally with non-sectarian ones, does not "preempt any provision of a State constitution ... that prohibits or restricts the expenditure of State funds in or by religious organizations." 42 U.S.C. § 604a(k). The Conference report explained: "In some States, provisions of the State constitution ... prohibit the expenditure of public funds in or by sectarian institutions." 141 Cong. Rec. H 15407 (daily ed., December 21, 1995). This in the context of a federal statute whose constitutionality is premised on a view of church-state relations diametrically opposed to that of the state constitutional amendments it preserves.

II. ALTHOUGH "PLAY IN THE JOINTS" IS NOT UNLIMITED, WASHINGTON IS WELL WITHIN ITS LIMITS

A. The Denial Of A Subsidy Does Not Unconstitutionally Relegate Religion To Outlaw Status

The Free Exercise (and Equal Protection) Clauses do not become nullities because a state ensconces a restriction on its relations with religion in its constitution. It is therefore not surprising that this Court has invalidated state constitutional provisions even where defended on grounds of separation of church and state. "Play in the joints" is not unlimited. Some state provisions–but not the one at issue here–are irreconcilable with the federal Constitution.

"Play in the joints" does not extend so far as to allow states to relegate religious institutions to outlaw status. However, a refusal to subsidize an otherwise legal activity

does not do so. A refusal to provide cash subsidies is fundamentally different from a refusal to provide police and fire protection for religious institutions, *Everson v Bd. of Educ. supra*, 330 U.S. at 17-18; *Zelman, supra*, 536 U.S. at 640 (Souter, J., dissenting). An institution without such protection is literally outside the law. An institution merely denied a subsidy is not.

The provision of the basic amenities of civilized society raises no Establishment Clause concern at all. Withholding such fundamental services–for whose provision "governments are instituted among men"–from religious institutions would violate the Free Exercise or Equal Protection Clauses. But in the American constitutional tradition, the denial of a subsidy is not the equivalent of outlawry, nor is it even intolerable discrimination against a protected right. *Harris v. McRae*, 448 U.S. 297 (1980).

"Play in the joints" is also appropriate only where a state is in the gray area between the Establishment and Free Exercise Clauses. Elsewhere, though, "play in the joints" is not the appropriate rubric. A state cannot condition state office on a belief in God, *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961), nor bar ministers from serving in its legislature, *McDaniel v. Paty*, 435 U.S. 618 (1978), by invoking "play in the joints."

Torcaso may itself be an Establishment Clause decision, 367 U.S. at 495. In *Paty*, the issue of whether the Free Exercise Clause barred special restrictions on religion was squarely presented. The state constitutional ban on dual service as legislator (or constitutional convention

delegate) and minister was premised on a need to prevent clergy from trading on an official position to advance religion.

Tennessee could show no more than the merest possibility that a clergy-legislator might not separate the role of an advocate for faith from the role of a secular decision maker. There was no evidence that its fears were anything but a chimera. This Court refused to uphold an idiosyncratic prophylactic rule targeting the religiously observant as a constitutionally reasonable way of forestalling an illusory threat.

Washington's challenged rule, and the state constitutional policy it implements, is not prophylactic. The problem it avoids is not hypothetical, nor a slippery slope to merely possible future harm, but present state subsidization of religion. It is premised on a conception of separation of church and state which, as this Court's Reports demonstrate, has deep roots in American history. It is an appropriate occasion for invoking "play in the joints."

B. "Play In The Joints" Is Not Appropriate In Public Forum Cases

Cases involving religious speech in a government owned public forum, *Widmar v. Vincent*, 454 U.S. 263, 272-73 (1981) and *Good News Club v. Milford Central School*, 533 U.S. 98, 113 (2001), both applied compelling interest analysis to a religious exclusion commanded by state law. Neither case, however, is inconsistent with the existence of a "play in the joints" standard, because neither intruded into a constitutional gray area and hence could not be described as a manifestation of "play in the joints." More generally,

these cases do not involve a cash subsidy for religion, with the special historical concerns that evokes, *Mitchell v. Helms, supra.*

Second, in both *Widmar* and *Good News*, the issue was whether equal access to a forum by a religious speaker constituted impermissible government aid to religion. The Court, in those, as well as in other, forum access cases, *Rosenberger*, *supra* and *Board of Educ. of Westside Comm. Schools v. Mergens*, 496 U.S. 226 (1990), found no state involvement and no possibility of confusion about state involvement. *Cf. Capitol Square Review and Advisory Bd. v. Pinnette*, 515 U.S. 753 (1995) (majority holds private speech appearing to be government speech subject to Establishment Clause). Because these cases did not fall into a gray area, there was no call for consideration of "play in the joints."

Here, by contrast, there is no question that tax funds extracted and expended by the state do subsidize religious education. While the broad availability of that benefit, and its disbursement to a religious institution only as a result of private choice, attenuate the state's involvement to the point of federal constitutional acceptability, *Zelman*, *supra*, state responsibility for the transfer of state funds to a religious institution remains undeniable. Attenuation is not the equivalent of non-existence.

Without repeating the ground covered at length by Petitioners, it is a settled feature of American law that government refusal to subsidize speech or other activity is not the equivalent of a penalty for engaging in constitutionally protected activity, *U.S. v. American Library Ass'n*, *supra*; *Rust v. Sullivan*, 500 U.S. 173 (1991); *Regan v. Taxation With Representation*, 461 U.S. 540 (1983). The precise limits of that principle have generated a complex body of decisions, and do not lend themselves to easy summation. Where such uncertainty prevails, "play in the joints" is the appropriate rule.

C. A State's Different View of Church-State Separation Can Be Compelling

The Court in *Widmar* declined to recognize Missouri's interest in achieving a greater separation between church and state than the federal Constitution provides as compelling enough to justify content-based speech discrimination. *Widmar*, *supra* at 276. It did not address, however, whether such an interest could be compelling in the context of a state's refusal to provide a subsidy for religious education.

Moreover, when *Widmar* was decided, the scope of the federal ban on aid to religious schools was far more robust than it is today. There was then a broad, federal no-aid rule, not a neutrality/private choice rule, *Mueller v. Allen*, 463 U.S. 388 (1983). Thus, a state anti-aid rule stricter than the federal rule could arguably be treated as overkill. As the *Mueller* neutrality/private choice rule has come to predominate, *Zelman v. Simmons-Harris*, however, the gap between the federal rule and the rule in states adhering to the older no-aid rule has grown far wider. It is not self-evident why a state may not declare that it has a public interest of the highest order, *Wisconsin v. Yoder*, 406 U.S. 205 (1971), in adhering to a different, older, vision of church-state relations.

Questions of the relations between institutions of government and those of faith are matters of the highest import, and are not merely matters of aesthetics, preference or practicality. Around the world they reach to the most profound questions of political and religious theory. Although not subject to empirical proof, questions of political and social theory can be compelling, as *Grutter v. Bollinger*, 123 S.Ct. 2325 (2003), unambiguously holds. The proper ordering of church and state is such a question.

Given *Employment Division v. Smith*'s, holding that any neutral law, no matter how trivial, see, *e.g.*, *U.S. v. James*, 328 F.3d 953, 957-58 (7th Cir. 2003) (religious head coverings), overrides a believer's interest in practicing his or her religion under the Free Exercise Clause, it cannot be the case that the interest in freely practicing one's faith takes precedence over all other government interests, including keeping the state from intervening in religion. Nor is there any textual indication that the Free Exercise Clause, and the values it represents, must always and unfailingly prevail over any interest in restricting a state's interest in non-involvement or non-subsidization of church affairs.

III. THE FREE EXERCISES CASES ARE NOT DISPOSITIVE

Appellees' case rests primarily on three Free Exercise or Free Speech Clause cases: *Sherbert v. Verner*, *supra*; *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993); and *Rosenberger v. Rector*, 515 U.S. 819 (1995). It would be a surprise if the Free Exercise Clause required the subsidization of religious education because that Clause is "written in terms of what the government cannot do to the individual, not what the individual can exact from the

government." *Lyng v. Northwest Indian Protective Ass'n*, 485 U.S. 439, 451 (1998), citing *Sherbert v. Verner*, *supra*, 374 U.S. at 412 (Douglas, J., concurring). Respondent's argument would also come as a surprise to Justice Brennan, who wrote for the Court in *Sherbert* (and those Justices who subsequently endorsed *Sherbert* in *Wisconsin v. Yoder*, 406 U.S. 205 (1972)) that his (or their) vote to hold South Carolina in violation of Ms. Sherbert's free exercise rights was in conflict with his (or their) joining the summary affirmances in *Brusca* and *Leutkemeyer*.

Sherbert, in any case, did not involve funding which flowed to a religious institution. Adelle Sherbert received unemployment benefits because she was unemployed, not because she was religious or attended church. Her church received nothing from the state. Religion was relevant only to the incidental question of whether Sherbert had good cause to turn down new (secular) employment.

Church of the Lukumi Babalu Aye v. City of Hialeah (*Lukumi*), *supra*, is even less helpful to Respondent than *Sherbert*. *Lukumi* repelled a rare regulatory effort to "suppress," 508 U.S. at 523, an unpopular religion. *Lukumi* is replete with references to the regulatory suppression of unpopular faiths, *e.g.*, 508 U.S. at 523-24, 534-35, 540, 542, 545-46. Nothing in that case suggests that the Court was thinking of the quite different problem of a state's refusal, in compliance with its own constitution, to subsidize religious education.

To ignore *Lukumi*'s facts, while quoting isolated snippets out of context, makes for appealing rhetoric and

poor law. *Lukumi* is not a bold and broad restatement of the religion clauses, sweeping away all that came before it.

Employment Division held that the Free Exercise Clause places no special limit on enforcement of generally applicable neutral laws which burden religious practice. *Lukumi* warned nevertheless that (1) the requirements of regulatory neutrality and general applicability have teeth; and (2) that both were to be judged realistically, not merely formally.

That leaves *Rosenberger v. Rector*, 515 U.S. 819 (1995), instantaneously distinguishable on the ground–repeated there twice–that it did not involve tax funds, and that its holding could not be extended to such funds, 515 U.S. at 841, 849.

This Court there also iterated that the student publication seeking funding was not a "'religious institution,' at least in the usual sense of that term as used in our case law, and it is not a religious organization as used in the University of Virginia's own regulations." 515 U.S. at 844; *id.* at 842. That is not true of Northwest College, to which Davey seeks a state payment. Those caveats cannot be dismissed as *dicta*. On the theory which carried the day below, the caveats in *Rosenberger* endorse line drawing which *prima facie* violates the Constitution.

Rosenberger, moreover, conceived of the subsidy there considered as creating a vigorous and capacious forum for speech, not one funding individual periodicals. This Court decided that case as if the problem was one of granting access to an existing forum. "The error made by the Court of Appeals ... lies in focusing on the money ... expended by

the government, rather than on the nature of the benefit received by the respondent." 515 U.S. at 843. And there, unlike here, no cash was transferred from state to a religious institution.

The benefit received by Davey is not access to a forum, but a paid theological education. *Widmar* and its progeny, culminating in *Zelman, supra*, hold that such a benefit would not violate the federal Establishment Clause. Neither *Rosenberger* nor any other case, including *Widmar*, holds that a state is barred from concluding that in such circumstances it is expending tax funds on religion in violation of its own fundamental charter. It is hardly a novel or radical idea in American political thought that paying for theological training is outside the purview of government. It would serve no useful function here to catalog the academic, historical and judicial treatments of the relevant, and hotly disputed, sources, as this Court has often canvassed that ground.

Respect for state dignity suggests that different responses to a crucial and disputed question of political philosophy ought not to be preempted by the federal government absent evidence—not present here—that such rigorous and unyielding preemption was intended.[11] "The [s]tates may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *Grutter v. Bollinger, supra*, 123

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11. See *Zelman, supra*, 536 U.S. at 678-79, n. 4 (Thomas, J., concurring) (arguing that there is federalism component to the Establishment Clause).

S.Ct. at 2346, citing *U.S. v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).

IV. WASHINGTON IS NOT SUPPRESSING RELIGIOUS IDEAS

The court below held that Washington "aim[ed] at the suppression of dangerous ideas," to wit, the religious viewpoints of Northwest College, 299 F.3d at 755. If that, and not preserving the independence of church and state from each other, were Washington's aim, it chose an odd way to do so.

Washington does not withhold grants from students who take religion courses or major in the academic study of religion. It does not withhold subsidies from students who take a course, or even several courses (including theology courses), taught from a religious point of view. It does not even withhold aid from students attending colleges where distinct religious viewpoints permeate the curriculum, *cf. Roemer v. Bd. of Public Works*, 426 U.S.736 (1976). Religious ideas are hardly condemned to an ideological gulag.

Washington, unlike the University of Virginia in *Rosenberger*, is not encouraging students to speak, but making available subsidies for the study of selected subjects. It is permitted great leeway in deciding where to direct its resources when granting subsidies. *U.S. v. American Library Ass'n*, *supra*,123 S.Ct. at 2303, 305 (Rehnquist, C. J.).

Washington is not penalizing the exercise of First Amendment rights as would denying veterans tax benefits to veterans affiliated with the Communist Party, *Speiser v. Randall*, 357 U.S. 513 (1958), or denying participation in government programs to women who have had an abortion,

Rust v. Sullivan, 500 U.S. 173 (1991). In those cases, the government would not be choosing what speech to subsidize, *U.S. v. American Library Ass'n*, *supra*, 123 S.Ct. at 2300 (collecting cases), but would be penalizing persons for speech or activities extraneous to the purposes of the subsidy. *National Endowment for Arts v. Finley*, 524 U.S. 569, 582-83, 587 (1998).

Davey was not penalized for being religious. Washington was simply refusing to pay for was his ministerial training. That is no more a burden on religion than failing to pay for an abortion is a burden on that constitutional right. *U.S. v. American Library Ass'n*, *supra*; *Harris v. McRae*, *supra*. Washington was insisting that the education, preparation and training of ministers was not an appropriate activity to subsidize with tax funds. That was surely a rational decision. No more is required when a government decides how to spend its own funds. *U.S. v. American Library Ass'n*, *supra* (plurality opinion).

V. WASHINGTON'S CONSTITUTION IS NOT ROOTED IN INVIDIOUS ANTI-CATHOLICISM

"Play in the joints" should not permit official discrimination against any religious group. The ban on the singling out of a religious group for unfavorable treatment is the "clearest command" of the Establishment Clause, *Larson v. Valente*, 456 U.S. 228, 244 (1982), situated at its core, not its periphery.

A plurality of this Court suggested in *Mitchell v. Helms*, *supra*, 530 U.S. at 829-830 (Thomas, J.) (plurality opinion), that much of the law barring aid to religious schools is rooted in rampant anti-Catholic bigotry of the 19th

century and hence is invalid. Other courts, *Kotterman v. Killian*, 193 Az. 273, 291, 922 P.2d 606, 624 (1999), *Society of Separationists v. Whitehead*, 870 P.2d 916 (Utah 1993), have endorsed that view of history.

That the nineteenth century debate over state aid to religious education revolved around subsidizing Catholic education is undeniable. These debates were sometimes tainted by raw anti-Catholicism, a taint enhanced by a witches' brew of anti-Irish and anti-immigrant feelings. See, W.M. McAfee, Religion, Race and Reconstruction (1998). It is true, too, that those seeking to reinforce the separation principle were largely Protestant and those opposed, largely Catholic.

It is a mistake, nevertheless, to conclude that these malignant ideas were the "but for" cause, *Hunter v. Underwood*, 471 U.S. 222, 228 (1985), of the restrictive state constitutional amendments collectively known as Blaine Amendments. The narrative of Blaine Amendments as anti-Catholicism *simpliciter* is grossly oversimplified.

The vigorous efforts to reinforce church-state separation did not arise in a vacuum, but were undertaken in response to positions of the Catholic Church as authoritatively enunciated by consecutive Popes in well-publicized encyclicals. Moreover, the Catholic Church for most of the 19th century found itself in opposition to almost every liberalizing democratic movement that arose in Europe. These positions, as well as the adoption in 1870 of

the doctrine of papal infallibility, were well-known to 19th century Americans.[12]

Collectively, these doctrines gave rise to a legitimate fear–which only in hindsight can be dismissed as unfounded–that the Catholic Church sought exclusive political power, and that, if it could, it would establish itself as the sole official church. Backers of Blaine Amendments were not challenging the modern Catholic Church after the Second Vatican Council accepted religious freedom and the separate roles of church and state, but a Church hostile to both ideas, each central to American constitutional thinking. Nineteenth century efforts to restate and reinforce Madisonian separation of church and state were not railing against a will-o-the-wisp, responding to the overheated imagination of demagogues, or scapegoating the innocent.

As early as 1832, Pope Gregory XIII, in his encyclical, *Mirari Vos*, denounced the idea of religious liberty as an "absurd and erroneous proposition."[13] His successor, Pope Pius IX, reiterated this criticism in the encyclical *Quanta Cura* (1864),[14] and the accompanying, and

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12. See also, D. Kertzer, The Kidnaping of Egardo Montara (1997); M. Borden, Jews, Turks and Infidels (1984) at 54-58 (describing American Jewish and Protestant reaction to kidnaping and forced baptism of Jewish child in Italy in 1860).

13. See J.T. Noonan, The Lustre of Our Country (1998) 360.

14. "And, against the doctrine of Scripture, of the Church, and of the Holy Fathers, they [*i.e.*, modernists] do not hesitate to assert that 'that is the best condition of civil society, in which no duty is recognized, as attached to the civil power, of restraining by

infamous, Syllabus of Errors. Error number 55 on the Syllabus was that "[t]he Church ought to be separated from the State, and the State from the Church."

Catholics recognized that these positions fueled opposition to the Church, sending up a "howl of indignation" from the press and prominent individuals such as William Gladstone, as Cardinal Martin Spalding acknowledged, J.A. Hennessey, American Catholics: A History Of The Roman Catholic Community In The U.S. (1981) at 164-65. L. Sewrey, The Alleged Un-Americanism Of The Church As A Factor In Anti-Catholicism In The U.S. (unpublished doctoral dissertation) (1954) at 12, 25-31, 88-90, citing, *inter alia*, William Gladstone, The Vatican Decrees In Their Bearing Upon Civil Allegiance 35 (1874).

Catholics made many efforts to explain away the Syllabus and the encyclicals, many emphasizing that they were not directed at the United States. Sewrey, *supra* at 81-90; Hennessey, *supra* at 164-65. Even a friendly observer

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enacted penalities [*sic*], offenders against the Catholic religion, except so far as public peace may require.' From which totally false idea of social government they do not fear to foster that erroneous opinion, most fatal in its effects on the Catholic church and the salvation of souls, called by Our Predecessor, Gregory XVI, an 'insanity,' *viz* that 'liberty of conscience and worship is each man's personal right, which ought to be legally proclaimed and asserted in every rightly constituted society; and that a right resides in the citizens to an absolute liberty ... whereby they may be able openly and publicly to manifest and declare any of their ideas whatever ....' But, while they rashly affirm this, they do not think and consider that they are preaching 'liberty of perdition' ...."

such as Sewrey notes of the church's critics, however, that "[t]he tendency to attribute to Catholics only a half-hearted commitment to American ideals acquires a certain degree of plausibility." *Id.* at 81. See also, J.T. Noonan, The Lustre of Our Country (1998) at 28 (criticizing post-World War II critics of pre-Vatican II church teaching on religious liberty, but noting "critics' distrust was genuine, and the doctrine they exploited had once been operative").

This being the case, it can hardly be said that the anti-Catholic rhetoric of the 19th century was nothing more than crude bigotry. By official papal pronouncement, the Church sought a radically different church-state settlement than prevailed in the United States.

Defenders of the existing order were legitimately entitled to forestall the possibility that, contrary to the protestations of American Catholics, the Church's authoritative spiritual leader was to be taken seriously; that aid to Catholic religious schools was part of a "seamless whole" with the Church's negative view of church-state separation; and that additional safeguards against such a contingency were urgently required.

The Catholic Church had every right to advance its political positions, *Paty*, *supra*. But its opponents were not forced by the First Amendment into silence. They were entitled to respond vigorously to its efforts without being subsequently condemned as bigots.

Whether those efforts to forestall a Catholic establishment were wise or not, whether the fears which fueled those concerns could have been otherwise deflected, the legitimate roots of that effort stand in stark contrast to

the raw bigotry which marked the disenfranchisement of blacks condemned in *Underwood*.

CONCLUSION

For the reasons stated, the judgment should be reversed.

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Supreme Court of the United States

GARY LOCKE, GOVERNOR OF WASHINGTON, ET AL.,
Petitioners,
v.
JOSHUA DAVEY,
Respondent.

On Writ of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF HISTORIANS AND LAW SCHOLARS ON BEHALF OF PETITIONERS GARY LOCKE, ET AL.

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INTEREST OF *AMICI CURIAE*[1]

Amici are legal and religious historians and law scholars who have studied, taught and written in the area of constitutional and religious history and the First Amendment in law schools and undergraduate schools across America. *Amici* file this brief in support of the Petitioners and in response to anticipated arguments by the Respondent and his *amici* about the historical record related to the no-funding principle as applied in the Washington Constitution. In particular, *amici* seek to help fully explain the complex history of the rise of the no-funding and nonsectarian principles during the nineteenth century and the incorporation of those principles in the law.

Our names and institutional affiliations (listed for identification purposes only) are contained in Appendix A.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision effectively prevents states from providing stronger guarantees of church-state separation and religious liberty than the First Amendment compels. In particular, the decision calls into question the legitimacy of Article I, section 11 of the Washington Constitution which, according to the Washington Supreme Court, affords "far stricter [protection] than the more generalized prohibition of the first amendment to the United States Constitution." Weiss v. Bruno, 509 P.2d 973, 978 (Wash. 1973). One line of attack against Article I, section 11, in the courts below was that it, like other state no-funding provisions, is based on anti-religious – in

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[1] This brief is filed with the consent of the parties. No counsel for either party to this matter authored this brief in whole or in part. Americans United for S aration of Church and State, a national, nonsectarian public interest organization not a party to this case, provided costs associated with the production, printing, and filing of this brief.

particular, anti-Catholic – sentiment arising out of a nativist impulse during the nineteenth century, as putatively represented by the Blaine Amendment of 1876.

Such arguments oversimplify the history and purposes of the no-funding principle while they indict valid constitutional provisions based on the possible motivations of a limited number of individuals.

The no-funding principle, based on notions of religious liberty and liberty of conscience, arose prior to and independently of the advent of Catholic parochial schooling or the rise of the nativist movement. The no-funding principle was incorporated into many state constitutions during the nineteenth century for reasons unrelated to anti-Catholic animus.

The Blaine Amendment of 1876 arose as a result of a complex dynamic of forces that intersected over the issue of American public schooling. Supporters and opponents were motivated by concerns about universal free public education, protecting the integrity of public school funding, the obligation of states to provide universal education, the federal role in ensuring and funding education at the state level, and the funding of religious instruction and training. Although animus against Catholic immigrants and parochial schools may have motivated some supporters of the proposed amendment, that was not the only basis for the amendment or rationale for its support. Similarly, there is a lack of evidence that anti-Catholic animus was behind the passage of the Enabling Act of 1889.

There is no evidence that the framers of the Washington Constitution were motivated by anti-religious or Catholic animus in enacting Article I, section 11. As can best be determined, no delegate to the 1889 state convention expressed any animus toward Catholic or religious schooling in voting on Article I, section 11 or Article IX, section 4. On the contrary, the framers of the Washington Constitution revealed a sensitivity to religious issues by securing "perfect toleration of religious sentiment" in the state's organic act.

ARGUMENT

I. Introduction

The decision of the Ninth Circuit calls into question the legitimacy of Article I, section 11 of the Washington Constitution which seeks to ensure greater separation of church and state than is mandated under the First Amendment to the United States Constitution. Witters v. State Comm'n for the Blind, 771 P.2d 1119, 1122 (Wash. 1989); Weiss v. Bruno, 509 P.2d 973, 978 (Wash. 1973).[2] On one level, the decision undermines the ability of states to be "freer to experiment with involvement [in religious matters] . . . than the Federal Government." See Walz v. Tax Comm'n, 397 U.S. 664, 699 (1970) (Harlan, J., concurring). Not only are issues of federalism at stake; as Justice Thomas has recently observed, there is a certain "wisdom of allowing States greater latitude in dealing with matters of religion and education." Zelman v. Simmons-Harris, 536 U.S. 639, 680 (2002) (Thomas, J., concurring). Although Justice Thomas may have been calling for greater flexibility for states to fashion benefits programs that include religious recipients, the principle of "greater latitude" provided state constitutional laboratories must extend both directions.

On a different level, the Ninth Circuit's holding provides support for critics of state constitutional provisions that mandate a stricter no-funding rule than exists under current interpretations of the Establishment Clause. Critics have insisted that such provisions, like Article I, section 11 and

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[2] Washington courts have also held that the free exercise provision of Article I, section 11 is more protective of religious liberty than is the First Amendment. See First Covenant Church v. City of Seattle, 840 P.2d 174 (Wash. 1992); State v. Balzer, 954 P.2d 931 (Wash. Ct. App. 1998).

Article IX, section 4, of the Washington Constitution, are based on hostility toward religion, and toward Catholicism and Catholic schooling in particular.[3] Members of this Court have expressed similar sentiments.[4] The Mitchell plurality's statements regarding the non-sectarian principle and the Blaine Amendment were made, however, without the benefit of briefing on this subject.

The no-funding principle, with its prohibition on funding sectarian programs and institutions, rests on a more "spacious conception"[5] of religious liberty and rights of conscience than this rendering suggests. The no-funding principle, as applied to educational matters, arose independently of and prior to the rise of Catholic parochial schooling and the organized nativist movement of the mid-nineteenth century. Many state constitutions – including Washington's – contain no-funding provisions that have nothing to do with anti-Catholicism or nativist sentiment. Similarly, the Blaine Amendment, which served as a model for the Enabling Act and, by implication, for Article IX, section 4 (but only indirectly for

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[3] See Joseph P. Viteritti, Choosing Equality: School Choice, the Constitution, and Civil Society 18 (1999) ("[A]n examination of Blaine's history shows that it was borne out of a spirit of religious bigotry and intolerance directed against Catholic immigrants during the nineteenth century. It was not conceived in the spirit of the First Amendment but to impose restrictions that its advocates thought were missing from the Constitution and Bill of Rights."); Philip Hamburger, Separation of Church and State 335 (2002) ("Nativist Protestants also failed to obtain a federal constitutional amendment but, because of the strength of anti-Catholic feeling, managed to secure local versions of the Blaine amendment in the vast majority of the states.").

[4] See Mitchell v. Helms, 530 U.S. 793, 828-29 (2000) (plurality opinion).

[5] See McCollum v. Bd. of Educ., 333 U.S. 203, 213 (1948) (Frankfurter, J., concurring).

Article I, section 11), cannot be explained as a mere exercise in Catholic bigotry. As a result, neither the no-funding principle nor Washington's constitutional provisions deserve invalidation on this ground.

II. The No-Funding Principle Arose Independently of Anti-Religious Animus.

A. Origins of the No-Funding Principle

The legal rule against public funding of religious enterprises, activities, instruction and worship is based on principles of religious liberty and rights of conscience that found expression in the struggle for independence from Great Britain and the founding of the national and state governments. As early as the 1770s, Thomas Jefferson and James Madison were equating government financial support for religion with infringements on religious liberty and rights of conscience. "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical," Jefferson wrote in 1779; "that even forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern."[6] Madison echoed Jefferson's belief that funding of religious worship and instruction violated notions of liberty:

> Who does not see . . . that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all

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[6] A Bill for Establishing Religious Freedom, 12 June 1779, in 5 The Founders' Constitution 77 (Philip B. Kurland & Ralph Lerner, eds., 1987).

cases whatsoever.[7]

Jefferson and Madison did not make these arguments in the abstract but raised them in opposition to an effort by the Virginia Assembly to impose an assessment for the support of houses of worship and teachers of religion, including teachers in private religious schools.[8] Madison applied this principle later as President when he vetoed a bill that would have authorized an Episcopal Church in the District of Columbia to receive poor funds for the education and care of destitute children.[9]

Although Jefferson and Madison's spacious views on church-state separation were not shared by all of their contemporaries, greater consensus existed over the issue of public funding of religion.[10] Funding of religious activities and enterprises was viewed as the anthesis of disestablishment. In

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[7] Memorial and Remonstrance Against Religious Assessments, 20 June 1785, in The Founders', supra note 6, at 82.

[8] See Douglas Laycock, 'Nonpreferential' Aid to Religion: A False Claim About Original Intent, 27 Wm & Mary L. Rev. 875, 897 & n.108 (1986); Thomas Buckley, Church and State in Revolutionary Virginia, 1776-1787 133 (1977) ("The assessment had been carefully drafted to permit those who preferred to support education rather than religion to do so.").

[9] See Veto Message to Congress, Feb. 21, 1811, in James Madison on Religious Liberty 79 (Robert S. Alley, ed., 1985). A week later Madison vetoed another bill that provided federal land for a Baptist church in Mississippi, with Madison stating that it established "precedent for the appropriation of funds of the United States for the use and support of religious societies, contrary to the article of the Constitution which declares that 'Congress shall make no law respecting a religious establishment.'" Id. at 80.

[10] See Thomas J. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment 217 (1986).

providing that "there shall be no establishment of any one religious church," the North Carolina Constitution of 1776 declared that no person could be "obliged to pay . . . [for] the building of any house of worship, or for the maintenance of any minister or ministry."[11] Baptist leader Isaac Backus urged disestablishment in Massachusetts on similar grounds, denying the authority of a "civil Legislature to impose religious taxes" for the support of any ministry.[12] At the time of the framing of the First Amendment, "[t]he belief that government assistance to religion, especially in the form of taxes, violated religious liberty had a long history."[13]

Thus, the principles of religious liberty, liberty of conscience, and separation of church and state arose independently of and prior to the rise of the common school movement or the development of the Catholic parochial school system. Although opportunities for applying this no-funding strain to religious schooling were rare prior to 1800, those instances alluded to above provide sufficient assurance that Jefferson and Madison viewed their constitutionally based principle as applying in the religious school context where worship and instruction in religious tenets take place.[14] This version of the no-funding principle therefore provides an independent and sufficient basis for nineteenth century opposition to funding of religious schools, apart from specific concerns about funding of Catholic schools.

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[11] N.C. Const. art. 34, in 5 The Federal and State Constitutions 2793 (Francis Newton Thorpe, ed., 1909).

[12] See The Founders', supra note 6, at 65 ("[W]e are persuaded that an entire freedom from being taxed by civil rulers to religious worship, is not a mere favor, from any man or men in the world, but a right and property granted us by God.").

[13] Curry, The First Freedoms, supra note 10, at 217.

[14] Id. at 141; Laycock, supra note 8, at 897.

B. The Rise of the Nonsectarian School

The no-funding principle also developed in conjunction with the rise of the common school. At the time of the nation's founding, public education was practically nonexistent with most schooling taking place through private tutors or in a handful of church-run schools.[15] Following the Revolution, early educational reformers such as Benjamin Franklin, Benjamin Rush, and Noah Webster began agitating for universal public schooling. These founding fathers were motivated by the conviction that education of children was indispensable for the stability and ultimate success of the new republic. Webster wrote in 1790 that education was "essential to the continuance of republican governments," as it "gives every citizen an opportunity of acquiring knowledge and fitting himself for places of trust."[16]

At the same time these framers criticized the traditional role of religion in the pedagogical process. In 1779, Thomas Jefferson drafted a plan for establishing public elementary schools in Virginia, proposing that "instead of putting the Bible and Testament in the hands of children at an age when their judgments are not sufficiently matured for religious inquiries, their minds may here be stored with the most useful facts from Grecian, Roman, European and American History."[17] Webster, writing a decade later, also criticized the reliance on religious texts and the teaching of sectarian doctrine common in most schooling. Webster encouraged relying on secular subjects such

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[15] See Essays on Education in the Early Republic xvi-xvii (Frederick Rudolph, ed., 1965); Readings in Public Education in the United States 75-140 (Ellwood P. Cubberely, ed., 1934).

[16] Noah Webster, On Education of Youth in America, (1790), in Essays on Education, supra note 15, at 65-66.

[17] Jefferson, A Bill for the More General Diffusion of Knowledge, in Jefferson: Magnificent Populist 248-49 (Martin A. Larson, ed., 1984).

as geography, economics, law and government, although he supported the reading of selective passages of the Bible for inculcating virtue and moral character.[18]

The first attempt at a comprehensive nonsectarian educational program came with the founding of the Free School Society of New York City in 1805.[19] From its inception the Society distinguished its charity schools from the local denominational schools by stressing the nonsectarian character of its curriculum which, its publications asserted, made its schools appropriate for children of all religious faiths. In addition to instructing in the "common rudiments of learning" the Society described its curriculum as teaching only "the fundamental principles of the Christian religion, free from all sectarian bias, and also those general and special articles of the moral code, upon which the good order and welfare of society are based." The Society asserted that its nonsectarian curriculum allowed children of all faiths to learn without the hobbling effects of sectarianism.[20]

For the first seventeen years of existence, the Free School Society competed with the denominational schools for state public school funds, although it increasingly received the lion's share of tuition and building funds.[21] In 1822, Bethel Baptist Church secured a state grant for construction of a school building from funds that had heretofore been available only to

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[18] See V.T. Thayer, Religion in Public Education 28-31 (1947); Webster, supra note 16, at 50-51, 64-67.

[19] See generally William Oland Bourne, History of the Public School Society of the City of New York (1870). See also John Webb Pratt, Religion, Politics, and Diversity: The Church-State Theme in New York History 158-203 (1967); Diane Ravitch, The Great School Wars: New York City, 1805-1973 3-76 (1974).

[20] Bourne, supra note 19, at 9, 38, 641.

[21] See Pratt, supra note 19, at 165-166.

the Free School Society.[22] The Society opposed the grant on grounds that it undermined nonsectarian education for children of all faiths and backgrounds and that funding of sectarian schools violated notions of separation of church and state. Here, the Society articulated several arguments that would serve as the basis for the no-funding principle: that the grant "impose[d] a direct tax on our citizens for the support of religion" in violation of rights of conscience; that funding of religious schools would cause competition and rivalry among faiths; that the school fund was "purely of a civil character;" and "the proposition that such a fund should never go into the hands of an ecclesiastical body or religious society, is presumed to be incontrovertible upon any political principle approved or established in this country. . . . that church and state shall not be united."[23] After considering the Society's memorials, the legislative Committee on Colleges, Academies and Common Schools in 1824 recommended that the Legislature discontinue funding for denominational schools, opining "whether it is not a violation of a fundamental principle . . . to allow the funds of the State, raised by a tax on the citizens, designed for civil purposes, to be subject to the control of any religious corporation."[24] The Legislature voted to authorize the New York City Common Council to make all future allotments of the school fund, which, the following year, voted to end the funding

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[22] See id. at 166-67; Bourne, supra note 19, at 49-50.

[23] Bourne, supra note 19, at 52-55, 88; Pratt, supra note 19, at 167.

[24] Bourne, supra note 19, at 70-72. The Society also claimed that it was "totally incompatible with our republican institutions, and a dangerous precedent in our free Government, to permit any part of such funds to be disbursed by the clergy or church trustees for the support or extension of sectarian education." Id. at 88.

of denominational schools.[25]

What is significant about this episode is that opposition to funding of sectarian schools arose in the context of a request made by a Protestant school. As the Society asserted in one of its resolutions, the funding of Bethel Baptist Church's school "promot[ed] . . . private and *sectarian* interests."[26] Also, significantly, the Society and the legislative committee viewed this bar as a "fundamental" constitutional mandate.[27] While it is possible that some Society officials were concerned about the potential, future establishment of Catholic parochial schools when they were crafting their arguments, nothing in the memorials and reports indicates such an awareness or apprehension. The first significant wave of Irish Catholic immigration was still a decade off, and it was not until the Second Provincial Council in 1833 that the American Catholic Church recommended the creation of a parochial school system.[28] According to popular understanding of the time, a sectarian school was any religious school in which particular doctrines were taught.[29] The Protestant denominational schools were *sectarian*. The developing consensus that public funds

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[25] See id. at 72-75; Pratt, supra note 19, at 167.

[26] Bourne, supra note 19, at 51.

[27] Id. at 70-72. The New York City Mayor and Common Council also supported the Society's position, arguing in its own memorial that funding of "religious or ecclesiastical bodies is [] a violation of an elementary principle in the politics of the State and country." Id. at 64-67.

[28] See Ray Allen Billington, The Protestant Crusade, 1800-1860 35-37 (1938); Peter Guilday, The National Pastorals of the American Hierarchy, 1792-1919 60-61, 74 (1923).

[29] See Memorial and Petition of the Mayor, Alderman, and Commonalty of the city of New York, in Bourne, supra note 19, at 66 (referring to the Protestant charity schools as "sectarian").

should not pay for religious education arose within this context.

That anti-Catholicism played no part in the rise of the no-funding principle is supported by an episode six years later. In 1830, the Roman Catholic Orphan Asylum and the Methodist Charity School petitioned for a share of the school fund to support their respective programs. The Free School Society, while raising the same church-state objections as before, also made what can best be described as an early argument about the pervasively sectarian character of the schools, noting that "one of the objects aimed at in all such schools is to inculcate the particular doctrines and opinions of the sect having the management of them."[30] In its characterization of sectarian schools, the Society did not distinguish between Catholic and Methodist programs. The Council's law committee concurred with the Society's arguments in its report, writing that "to raise a fund by taxation, for the support of a particular sect, or every sect of Christians, [] would unhesitatingly be declared an infringement of the Constitution, and a violation of our chartered rights."[31]

> Your committee cannot, however, perceive any marked difference in principle, whether a fund be raised for the support of a particular church, or whether it be raised for the support of a school in which the doctrines of that church are taught as a part of the system of education.[32]

Despite the committee's recommendation, the Common Council approved payment to the Catholic Orphan Society on

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[30] Id. at 126. See also id. at 128 (arguing that the "system of education" in such schools is "so combined with religious instruction.").

[31] Id. at 139.

[32] Id. at 139-140.

the apparent theory that the funds primarily supported the *care* of the orphans, not their education. The Council, though, denied the request of the Methodist Charity School, reaffirming its 1825 decision that public funds could not pay for sectarian education.[33] The episode again indicates that all parties viewed the notion of sectarian education and the accompanying bar on its funding in generic terms, applying to all religious schools.[34] In this instance, because the Catholic Orphan Society was providing primarily a charitable service rather than sectarian education, it was eligible for public support. If anti-Catholicism had fueled the debate, then the outcome would have been reversed, or at least resulted in the denial of funds for both institutions.

As a result of these episodes, the no-funding principle was firmly established in New York by the time the first true controversy over Catholic school funding arose in the 1840s. In this familiar account, the New York Legislature rejected a petition from Bishop John Hughes for a share of the public school fund for Catholic parochial schools.[35] The Legislature

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[33] Id. at 145, 148.

[34] In urging the Council to adhere to its 1825 decision, the Law Committee argued that "Methodist, Episcopalian, Baptist, and *every other sectarian school*, [would] come in for a share of this fund. . . . It would be . . . no[] less fatal in its consequences to the liberties and happiness of our country, to place the interest of the school fund at the disposal of sectarians. It is to tax the people for the support of religion, contrary to the Constitution, and in violation of their conscientious scruples." Id. at 140 (emphasis added).

[35] Bishop Hughes criticized the common schools for their practice of Protestant Bible reading and instruction. In turn, Protestant churches and nativist groups characterized Catholic demands as a threat to public schooling and republican government. See Bourne, supra note 19, at 178-323, 350-495; N.Y. Observer, Jan. 16, 1841, at 10; Pratt, supra note 19, at 178-181; Ravitch, supra note 19, at 46-57.

enacted a law in 1842 that prohibited the granting of public funds to any school where "religious sectarian doctrine or tenet shall be taught, inculcated, or practiced."[36] Although the 1842 law may have been in response to the Catholic petition, the no-funding principle upon which it was based had been established in New York for twenty years.

III. There is No Evidence that Anti-Catholicism Played a Significant Role in the Development of Many Early State Constitutions.

Critics have argued that the no-funding provisions of many early state constitutions came about primarily through the influence of antebellum nativist groups, in particular, the Know-Nothing party. Massachusetts is commonly exhibit number one, where in 1854 Know-Nothings swept the 1854 state elections and were reputedly instrumental in obtaining passage of a no-funding provision in the state constitution.[37]

Nativism cannot be held responsible for all state enactments or explain the basis for similar and earlier enactments in other parts of the country where there was no significant religious dissension or nativist activity.[38] Michigan

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[36] Bourne, supra note 19, at 496-525; Pratt, supra note 19, at 182-190; Ravitch, supra note 19, at 58-76.

[37] See John R. Mulkern, The Know-Nothing Party in Massachusetts 76, 94-103 (1990); Lloyd P. Jorgenson, The State and the Non-Public School 85-93 (1956).

[38] Professor Ray Billington indicates in his seminal study of antebellum nativism that the Know-Nothings were relatively ineffective in enacting anti-Catholic legislation, even in those states where they briefly held clear majorities. Billington, supra note 28, at 412-417. Billington also notes that nativism was most effective in the northeastern states and that Know-Nothings "showed little strength in the middle west." Id. at 391, 396.

adopted a no-funding provision in its 1835 constitution[39] even though the state lacked a significant number of Catholic parochial schools and the enactment came before the wave of Catholic immigration.[40] The Michigan Constitution served as the model for similar constitutional provisions in Wisconsin (1848), Indiana (1851), Minnesota (1857), and Oregon (1857), all states without significant conflicts over parochial school funding at the time. In Wisconsin, for example, the common school movement with its emphasis on universal, nonsectarian education predated the Catholic Church's establishment of a parochial school system.[41] Despite some tension between native Protestants and German Catholic and Lutheran immigrants during the late territorial period, there is "no evidence that the

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[39] "No money shall be drawn from the treasury for the benefit of religious societies, or theological or religious seminaries." Mich Const. of 1835, art. I, § 5. 4 The Federal and State Constitutions 1931 (Francis Newton Thorpe, ed., 1909).

[40] Thomas M. Cooley, Michigan: A History of Governments 306-329 (8th ed., 1897). Apparently, Catholic and Presbyterian clergy were instrumental in the movement to establish universal nonsectarian schooling at both the collegiate and common school levels. Id. at 309-311.

According to Professor Billington, at the same time that Michigan was drafting its constitution, the Protestant Home Missionary Society was reporting a lack of concern over Catholic activity in the upper midwest. See Billington, supra note 28, at 130.

[41] See Alice E. Smith, 1 The History of Wisconsin 588-589 (1985); Richard N. Current, 2 The History of Wisconsin, 162-169 (1976). See also Joseph A. Ranney, 'Absolute Common Ground': The Four Eras of Assimilation in Wisconsin Education Law, 1998 Wis. L. Rev. 791, 793-93, 796-97 (1998) (placing the development of the parochial school systems after the enactment of the 1848 Constitution). Even Prof. Jorgenson, a critic of the common school movement, documented no anti-Catholic animus in his study of the creation of the Wisconsin public education system. See Jorgenson, The Founding of Public Education in Wisconsin 68-93 (1956).

[Wisconsin] lawmakers and constitution makers were anti-religious in making the [no-funding] requirements, or that they harbored a prejudice against any sect."[42] A similar conclusion can be reached for the no-funding provision of the Indiana Constitution of 1851.[43] Finally, the Oregon Constitution of 1857, which influenced the drafters of the 1889 Washington Constitution, borrowed its no-funding language from the Indiana Constitution.[44] The minutes of the Oregon convention are bereft of any statements hostile to Catholicism or parochial school funding, with the only religious controversies involving whether to allow for legislative chaplains or acknowledge the deity in the constitution preamble. Like constitution framers in many other states, the Oregon delegates were committed to securing a "complete" separation of church and state based on matters of principle, not anti-religious animus.[45]

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[42] Smith, supra note 41, at 593.

[43] See Barclay Thomas Johnson, Credit Crisis to Education Emergency: The Constitutionality of Model Student Voucher Programs Under the Indiana Constitution, 35 Ind. L. Rev. 173, 200-203 (2001) (indicating that in 1850, less than six percent of Indiana inhabitants were immigrants and fewer still were Catholics. The no-funding provision was not "a remnant of nineteenth century religious bigotry promulgated by nativist political leaders who were alarmed by the growth of immigrant populations and who had a particular disdain for Catholics."). Id. at 203.

[44] See The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857 302 (Charles Henry Clay, ed.,1926).

[45] Id. at 296-308. Although split over the issue of legislative chaplains, the Oregon delegates were in agreement about the principle against funding worship or religious institutions:

Mr. Grover: "The late constitutions of the western states have, step by step, tended to a more distinct separation of church and state, until the great state of Indiana, whose new constitution has been most recently framed, embracing very nearly the principle

Thus there is little evidence that anti-Catholicism or disdain for Catholic schooling played a significant role in the development of the no-funding principle or in the enactment of many no-funding provisions prior to the Civil War. On the contrary, state constitution drafters were primarily concerned with the survival of the nascent public schools and in securing their financial security.[46] Even in those states where anti-Catholicism may have played a role in the enactment of the no-funding provisions, the rationale for the no-funding rule was already well-established.

IV. The Blaine Amendment Arose from a Variety of Motivations, of which Anti-Catholicism was only One Factor.

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contained in this section, as reported, now under consideration."

"It is true this constitution goes a step further than other constitution on this subject, but if that step is in the right direction, and consistent with the proper development of our institutions, I see no weight in the objection that it is new. Let us take the step farther, and declare a complete divorce of church and state." Id. at 302-03.

Mr. Davey: "But sir, what is the theory of our government upon this subject? It is that the government shall be separated from the churches, and the maintenance and administration of religion; that religious duties shall be no function of the government. And why? Because the country contains persons of all religious denominations, as well as nonbelievers, and if you have religious services carried on and paid for by the government, you necessarily tax all the people to support sone one religion, let their sentiments be what they may." Id. at 303-04.

Mr. Williams: "Nor did he believe that congress had any right to take the public money, contributed by the people, of all creeds and faith [sic], to pay for religious teachings. It was a violent stretch of power, and an unauthorized one. A man in this country had a right to be a Methodist, Baptist, Roman Catholic, or what else he chose, but no government had the moral right to tax all of these creeds and classes to inculcate directly or indirectly the tenets of any one of them." Id. at 305.

[46] Id. at 200.

The Blaine Amendment of 1876 has been maligned as an unfortunate episode in Catholic bigotry. See Mitchell, 530 U.S. at 828-29.[47] Although it is indisputable that anti-Catholic animus motivated many supporters of the amendment and colored the debates surrounding its near enactment, this is an incomplete account. The Blaine Amendment was the culmination of eight years of heightened attention to and conflict over the "School Question." Arising in the years following the Civil War, the School Question involved more than a concern about parochial school funding; that issue was part of a larger controversy over the responsibility and role of the federal government in public education, over whether that education should be truly universal for all social and economic classes and races (including the children of recently freed slaves), over ensuring the financial security of the still nascent public education system, and over whether that education should be secular, nonsectarian (i.e., watered-down Protestantism), or more religious.[48] The battle lines were not drawn solely between Catholics and nativists but involved other groups and concerns: liberal Protestants, free-thinkers, and Jews who opposed the religious exercises and nonsectarian character of the nation's schools; conservative Protestants who sought to preserve or *increase* the Protestant character of many public schools; education and civil rights reformers who sought a larger government role in funding and regulating public education; Democratic and Republican partisans who had little interest in education issues but viewed Catholics as a voting block to cultivate or demonize; and state-rights advocates who saw no government role in education, particularly at the federal and state levels.

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[47] See Charles L. Glenn, Jr., The Myth of the Common School 73-77 (1988); Viteritti, supra note 3, at 145-155.

[48] Ward M. McAfee, Religion, Race and Reconstruction 105-124 (1998).

Also, it is inaccurate to speak of *a* Blaine Amendment, particularly as a concept or model for the Enabling Act or state constitutional provisions. Rather, the 1870s witnessed multiple proposals for a education-related constitutional amendment – President Ulysses Grant's proposal; James G. Blaine's initial proposal; a Democratic alternative; secularist proposals and ultra-conservative religious proposals; the House-passed version; and the failed Senate version – all of which contained different language and received varying levels of support and opposition.[49] As addressed below, Blaine's original proposal received much greater support among Democrats and Catholics than the final Senate version.[50] The Enabling Act and the Washington Constitution more closely track the original Blaine proposal than the final Senate version.

The impetus for the Blaine Amendment came out of a controversy over an 1869 decision by the Cincinnati school board to abolish the practice of daily prayer and readings from the King James Bible.[51] Although initially enjoined by a trial court, a unanimous Ohio Supreme Court upheld the Board's action. See Board of Education v. Minor, 23 Ohio St. 211 (1872). Closely followed throughout the country, the Cincinnati "Bible War" reignited a debate over the religious character of public schooling – over whether schools should retain their Protestant nonsectarian complexion or whether they

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[49] See Steven K. Green, The Blaine Amendment Reconsidered, 36 J. Legal Hist. 38, 47-55 (1992) (discussing the various competing proposals).

[50] See 20 Cong. Rec. 5581 (Aug. 14, 1876) (remarks of Senator Francis Kernan (D-NY)).

[51] See generally The Bible in the Public Schools: Arguments in the Case of John D. Minor versus the Board of Education of the City of Cincinnati (Robert McCloskey, ed., 1870); Harold M. Helfman, The Cincinnati 'Bible War,' 1869-1870, 60 Ohio St. Arch. & Hist. Quart. 368 (1951).

would become truly secular and open to all faiths and nationalities. More broadly, the controversy implicated the future of American public schooling, with some believing that a secular educational system would ameliorate Catholic complaints about Protestant-oriented schooling but others fearing that a truly secular educational system would engender even greater competition for limited school funds between Catholic, Protestant and public schools.

Following the Cincinnati case, the New York and Chicago city school boards prohibited Bible reading and religious instruction in their respective schools, with similar bans being adopted in Michigan and other northern states.[52] The actions deeply split the Protestant community, with some believing that the removal of Protestant prayer and bible reading would lead to immorality and "the ruin of the Republic."[53] Others, including Rev. Henry Ward Beecher, argued that "compulsory Bible in schools is not in accordance with American doctrine of the liberty of conscience" and should be abolished.[54] Finally, during the same period (1868-1876) ultra-conservative Protestants mounted a campaign for a constitutional amendment to insert a recognition of God in the Preamble, in part to ensure that America and its institutions remained "Christian."[55] This set of events led the New York

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[52] N.Y. Times, Dec. 9, 1872, at 8.

[53] Conspiracy Against the School System, Christian Advocate, Nov. 25, 1869, at 372.

[54] N.Y. Tribune, Dec. 3, 1869, at 5. Beecher wrote that the state "has no business to teach religion, or to show partiality to one or another sect in religion." Id.

[55] The Christian Statesman, Feb. 28, 1874, at 35; see Steven K. Green, "The National Reform Association and the Religious Amendments to the Constitution, 1864-1876," (1987) (unpublished M.A. thesis, on file with the Department of History at the University

Tribune in 1875 to opine that the "School Question" "excites sharp controversy," and was threatening "the very existence of the republic. . . . The admission of parochial schools as a part of the public-school system is openly demanded. Sooner or later the broad question must be met, 'Whether popular education belongs to the State or the churches.'"[56]

It was in this climate that President Ulysses Grant, and ultimately James G. Blaine, proposed amending the Constitution to settle the School Question. As introduced by Blaine, the amendment sought to achieve two things: (1) make the provisions of the First Amendment apply directly to state actions; and (2) to prohibit the allocation of public school funds or other public monies or land to religious institutions.[57] Grant's proposal, as represented in his annual message to Congress on December 7, 1875, was much broader, recommending an amendment "making it the duty of each of the several states to establish and forever maintain free public schools adequate to the education of all the children in the rudimentary branches . . . irrespective of sex, color, birthplace, or religions."[58] Even though this provision did not make it into the final language of Blaine's proposal, the issue of a federally

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of North Carolina - Chapel Hill).

[56] N.Y. Tribune, July 8, 1875, at 4.

[57] "No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, not any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations." 4 Cong. Rec. 205, 44th Cong. (1st Sess.1875).

[58] See Seventh Annual Message, Dec. 7, 1875, reprinted in Ulysses S. Grant 92 (Philip P. Moran, ed., 1968). Grant also recommended the taxation of church property. Id.

mandated education fueled the debate.[59] The issue of universal education also had racial implications, complicating the debate among Republicans and Democrats.[60]

To be sure, many observers viewed the amendment as crass political maneuvering designed to appeal to anti-Catholic voters.[61] Others, however, viewed the amendment as an opportunity to resolve the larger School Question while avoiding religious strife. Both the Republican New York Times and the Democratic New York Tribune supported Blaine's proposal as a way of diffusing the religious issue.[62] The

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[59] McAfee, supra note 48, at 4-5, 15-21, 105-124 (1998). The nation's leading religious journal, The Independent, raised concerns the proposed amendment was the first step toward mandating states to provide universal education: "Whether a State shall have a public school system or not is purely and absolutely a State question . . . and it should be left to the sovereign discretion of every State." See Samuel T. Spear, Religion and the State, or The Bible and the Public Schools 21 (1876). See also Lyman Atwater, Civil Government and Religion, Presbyterian Quarterly and Princeton Review 195 (April 1876) (arguing that universal secular education was "wholly beyond the proper function of the national government, and an unwarranted invasion of the proper liberties and franchises of the States.").

[60] McAfee, supra note 48, at 105-124.

[61] See The Nation, Mar. 16, 1876 at 173. ("Mr. Blaine did, indeed, bring forward at the opening of Congress a Constitutional amendment directed against the Catholics, but the anti-Catholic excitement was, as every one knows now, a mere flurry; and all that Mr. Blaine means to do or can do with his amendment is, not to pass it but to use it in the campaign to catch anti-Catholic votes.").

[62] See N.Y. Times, Dec. 8, 1875, at 6, and Dec. 15, 1875, at 6; N.Y. Tribune, Dec. 8, 1875, at 6, and Dec. 15, 1875, at 4 ("Thinking men of all parties see much more to deplore than to rejoice over, in the virulent outbreak of discussions concerning the churches and the schools, and welcome any means of removing the dangerous question from politics as speedily as possible."). N.Y.

Independent, the nation's leading religious journal, also viewed the controversy in broader terms, insisting that the funding issue "manifestly does not cover the whole question in controversy."[63] Rather, the controversy "bring[s] to the surface the whole subject of Church and State, civil government and religion, in their relations to each other."[64]

Therefore, a combination of issues – whether public schooling should be secular or religious and truly universal for all faiths, races and nationalities, whether the national government should mandate schooling at the state or local levels, and how best to diffuse religious strife – fueled the debate surrounding the Blaine Amendment as much as the issues of parochial school funding or anti-Catholicism.[65] For many people these issues were interrelated. The fact that they were intertwined, however, does not mean that support for the amendment was one-dimensional or limited solely to efforts to disadvantage Catholics by denying them a share of the public

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Tribune, Dec. 15, 1875, at 4.

[63] Spear, supra note 59, at 18.

[64] Id. at 24. According to The Independent, the School Question also implicated issues of federal control over education and whether public schools would retain their Protestant nonsectarian character, would become more Protestant in their practices, or would become "purely secular." Id. at 17-18, 21-22, 44-66.

[65] Blaine's motives are unclear. There is no evidence that Blaine had any personal animosity toward Catholics. His mother was Catholic and his daughters were educated in Catholic schools. Most likely, he viewed the amendment as a means of capitalizing on public interest in the School Question in hope that it would help secure him the Republican presidential nomination. See Marie Carolyn Klinkhamer, The Blaine Amendment of 1875: Private Motives for Political Action, 42 Cath. Hist. Rev. 15, 32-34 (1955); Green, supra note 49, at 54.

school fund. Despite the tendency of some elements to resort to inflamed rhetoric, most observers viewed the controversy in broader terms about the future of American education.

The Senate debate reflects these myriad concerns. Floor debate focused on issues of federalism, the states' rights to control education, the financial security and religious character of public schools, the partisan nature of the amendment and, finally, the proposed ban on parochial school funding.[66] For example, Senator Theodore Randolph (D-N.J.) charged that the proposed amendment would infringe on state authority over education and create new obligations upon the states by imposing the duty to educate, an area reserved to the states under the 10th Amendment.

> (T)here is not only no duty devolving upon the Federal Government, by reason of any provision in the Constitution, to directly care for the education of its citizens, but that the attempt upon the part of the Federal power to exercise authority in this direction would be without warrant, and as pernicious in precedent as it would finally become dangerous in practice.[67]

Various senators echoed Randolph's concern that the amendment would usurp state authority over educational matters.[68] Senators also distinguished between Blaine's original

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[66] See 4 Cong. Rec. 5580-5595 (1876).

[67] Id. at 5455. Beyond his specific concern over usurpation of state authority over education, Randolph also believed the amendment threatened state control over general expenditures by imposing an obligation on the states to establish schools. Id.

[68] Senator Kernan: "I believe that the matter of educating our children may be wisely left to the people of each State. I believe that it is a home right." Id. at 5580.

Senator Stevenson: "No, sir; this power is not in the Federal Government. Kentucky does not want New England and other states to dictate to her what her schools shall be or what her taxes shall be, and least of all what her religion shall be." Id. at 5589.

proposal, which had far wider support, and the final Senate version that not only contained a much broader no-funding provision but also guaranteed that Protestant bible reading could not be excluded from the public schools.[69] Significantly, New York Democratic senator Francis Kernan, a Catholic, voiced his support for Blaine's original proposal.[70]

In the end, the amendment failed because of a combination of concerns about federalism, mandating universal public education, the religious/secular character of public schools, and the imposition of federal constitutional protections on the states.[71] It also failed due to overreaching by Senate Republicans who expanded on Blaine's original no-funding proposal, a proposal that had much wider support. While anti-Catholicism motivated some supporters of the various proposals, that factor alone did not control the debate and should be distinguished from sincere beliefs that funding of parochial schools would threaten the nation's commitment to public schooling and undermine church-state separation. The Blaine Amendment must thus be viewed within this larger controversy over the character and future of American public

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[69] Id. at 5453.

[70] Id. at 5580. Kernan stated that Blaine's proposal "met with no considerable opposition in any quarter. It declares that money raised in a State by taxation for the support of public schools or derived from any public land therefor or any public lands devoted thereto shall not be under the control of any religious sect or denomination, nor shall any money so raised by divided among the sects or religious denominations. *Were this before the Senate I would support it.*" Id. (emphasis added).

[71] Anson Phelps Stokes, 2 Church and State in the United States 727 (1950).

schooling.

V. There is No Evidence that the Framers of Article I, Section 11, were Motivated by Anti-Religious or Catholic Animus.

In framing the Washington Constitution of 1889, drafters included Article I, section 11's prohibition on applying or appropriating public monies for "religious worship, exercise or instruction, or the support of any religious establishment." This language (and similar language contained in Article IX, section 4) originated from several sources. First, the federal Enabling Act of 1889, which authorized the drafting of the Washington Constitution, required the state constitutional convention to include a provision "for the establishment and maintenance of a system of public schools, which shall be open to all children . . . and free from sectarian control."[72] Although the Enabling Act likely served as the basis for Article IX, section 4,[73] the Act's connection to Article I, section 11, the provision implicated in Davey, is less clear. In addition, the Washington framers borrowed heavily from other state constitutions, most particularly the Oregon Constitution, and to a lesser extent the California and federal constitutions. See Robert F. Utter & Hugh D. Spitzer, The Washington State Consitution: A Reference Guide 9 (2002). Also, the state Declaration of Rights, which includes Article I, section 11, drew from a model drafted by W. Lair Hill, which too was based on the Oregon Constitution. Id. As discussed above, there is no evidence that anti-Catholic or religious animus motivated the drafting of the Oregon Constitution.

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[72] See Enabling Act, ch. 180, § 4, 25 Stat. 676-77 (1889).

[73] "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence."

Assuming the relevance of the Enabling Act for Article I, section 11, divining a motivation for its no-funding requirement is all but impossible. Congress enacted the Act in 1889 to authorize and facilitate the admission of North and South Dakota, Montana and Washington as states. Of primary interest for members of Congress was to ensure a balance of Democratic and Republican representation from the new states; other issues were of secondary import. See 20 Cong. Rec. 871 (1889).[74] The House Committee on Territories reported language that became section 4 of the Act in the original bill (H.R. 8566), apparently without any recorded discussion of the school provision.[75] Although the Blaine Amendment likely influenced the language of section 4, there is little legislative history to explain its purpose.[76]

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[74] See Robert F. Utter and Edward J. Larson, Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution, 15 Hast. Const. L. Quart. 451, 460 (Spring 1988).

[75] See H.R. Rep. No. 1025 (1888).

[76] Utter and Larson point to contemporaneous statements by Senator William W. Blair, that indicate his view that section 4 was to prohibit funding of sectarian schools while ensuring that public schools could continue to educate children in "virtue, morality and the principles of the Christian religion," likely code words for Protestant nonsectarianism. Utter & Larson, supra text, section V at 26, at 461-467. Although no senator objected to Blair's comments about section 4, as Utter and Larson contend, no senator concurred. See 20 Cong. Rec. 2100-2101 (Feb. 20, 1889). Silence alone cannot be interpreted as consent or agreement. See United States v. O'Brien, 391 U.S. 367, 384 (1968) ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it."). See also Anson Phelps Stokes and Leo Pfeffer, Church and State in the United States 566 (1964) (discussing Blair's association with ultraconservative religious causes). Blair's sentiments with regard to the Enabling Act cannot be attributed to other members of Congress.

No record exists of the debates of the Washington Constitutional Convention of 1889.[77] However, the proceedings and recorded votes are contained in an official Journal which can be used in conjunction with contemporaneous newspaper reports to develop an account of the convention.[78] The convention considered Article I, section 11 and Article IX, section 4, on July 25 and 29, and August 7 and 10, 1889.[79] Even though regional newspapers closely covered the deliberations, frequently reproducing debates verbatim, no contemporary article for those days mentions any statement or comment by delegates expressing hostility toward, or support for, Catholic parochial schools. While the absence of a reported account is not necessarily evidence that such sentiments were not expressed, the newspapers were otherwise meticulous in reporting on religious issues.[80] Extensive debate occurred over a proposal to recognize God in the constitution's preamble with additional debate taking place over whether to exempt church property from state taxes, with the convention rejecting arguments that exempting churches from taxation violated

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[77] See The Journal of the Washington State Constitutional Convention 1889 vi-vii (1962).

[78] Id. Detailed newspaper accounts of the convention are contained in Washington State Constitutional Convention 1889: Contemporary Newspaper Articles (1999) (containing articles from fifteen Washington and Oregon newspapers).

[79] See The Journal of the Washington State Constitutional Convention 1889, supra note 77, at 154-55, 190-91, 276-77, 329-330.

[80] See Washington State Constitutional Convention, supra note 78, at 1-52, 1-77, 2-63, 3-38/39, 3-78, 4-46/47, 4-80, 5-57/58, 5-59/60, 5-79, 5-86, 6-14, 6-23, 6-75, 6-81, 6-115.

separation of church and state.[81] Significantly, on the same day that delegates debated exempting churches from taxation (August 7, 1889), an item extensively covered by several newspapers, the convention reported out Article IX, section 4 (the school funding provision) without any recorded debate.[82] Despite coverage by several newspapers, no article reports any statements indicating hostility or animus toward any religious group or institution.[83] In sum, there is no evidence in the accounts of the convention to indicate that the delegates held any animosity toward any religion, or Catholicism in particular, or that they enacted Article I, section 11 or Article IX, section

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[81] See Oregon Statesman, Aug. 2, 1889, p.1.col 1 (preamble); Puget Sound Weekly Argus, Aug. 8, 1889, p. 1. col. 3 (preamble); Seattle Times, July 25, 1889, p. 1, cols. 2-4 (exemption); Spokane Falls Review, July 26, 1889, p. 1, cols. 6-9 (exemption); Tacoma Daily Ledger, July 26, 1889, p. 4, cols. 1-4 (exemption); Walla Walla Weekly Statesman, Aug. 3, 1889, cols. 1-2 (preamble).

[82] Tacoma Daily Ledger, Aug. 8, 1889, p. 4, cols. 1-4; Tacoma Morning Globe, Aug. 8, p. 1, cols. 1-2. The only recorded debate on either religion clause took place on August 10, 1889, involving Article IX, section 4, where the delegates turned back efforts to amend the provision by inserting a prohibition on "religious exercise or instruction" in the public schools and substituting the word "religious" for "sectarian" in the provision barring "sectarian control or influence over public schools." See Spokane Falls Review, Aug. 11, 1889, p. 2, col. 6; Tacoma Morning Globe, Aug. 11, 1889, p. 1, cols. 1-2.

[83] As can best be determined, the sole reference to the Catholic Church occurred during the debate over exempting church property from state taxes, with Delegate S. G. Cosgrove, a supporter of the exemption, reportedly stating that "He thought efforts to fix a limit [on the exempt value of church property] were directed at the Catholic church, '[o]r at least that statement has been made in print, and by a man prominent in movement to limit [the] exemption." Tacoma Daily Ledger, Aug. 8, 1889, p. 4, cols. 1-4. As noted, the convention *rejected* efforts to exclude churches from the tax exemption.

4, with an intent to discriminate against religion.

CONCLUSION

The constitutional prohibition on funding sectarian programs and institutions is based on principles of religious liberty and rights of conscience. This rule arose independently of and prior to the rise of Catholic parochial schooling and the organized nativist movement of the mid-nineteenth century. In addition, there is no evidence that the no-funding provisions of the Washington Constitution are based on any form of anti-religious animus. Those provisions stand as a legitimate expression of the people of Washington to guarantee the fullest protection of religious liberty and separation of church and state.

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July 17, 2003

APPENDIX A

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No. 02-1315

IN THE

Supreme Court of the United States

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, ET AL., *Petitioners*,

v.

JOSHUA DAVEY, *Respondent*.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION, ARIZONA SCHOOL BOARDS ASSOCIATION, MICHIGAN ASSOCIATION OF SCHOOL BOARDS, MINNESOTA SCHOOL BOARDS ASSOCIATION, NEW YORK STATE SCHOOL BOARDS ASSOCIATION, PENNSYLVANIA SCHOOL BOARDS ASSOCIATION, UTAH SCHOOL BOARDS ASSOCIATION, VIRGINIA SCHOOL BOARDS ASSOCIATION, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, HORACE MANN LEAGUE, AND PUBLIC EDUCATION NETWORK, IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Washington is required by the Free Exercise Clause to fund religious vocational training as part of a general scholarship program.

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INTEREST OF AMICI[1]

The National School Boards Association ("NSBA"), founded in 1940, is a not-for-profit federation of state associations of school boards across the United States, including the school boards of the District of Columbia, Guam, and the U.S. Virgin Islands. Many of these states have constitutional provisions similar to the one at issue in this case. NSBA also represents the nation's 95,000 school board members, who govern the 14,722 local school districts that educate 47,000,000 public school students. NSBA is dedicated to the improvement of public education in America and has a long-standing interest in ensuring that state and local governments have maximum flexibility in education funding and other education policy decisions consistent with constitutional requirements.

The Arizona School Boards Association ("ASBA") is a not-for-profit organization representing the governing boards of 225 of Arizona's 230 school districts. The mission of ASBA is "to support the improvement of student achievement by providing leadership and assistance to local school district governing boards serving children and communities, and to promote lay control of public education." Arizona's Constitution, like Washington's, prohibits the use of public funds for religious instruction. Ariz. Const. art. II, § 12 ("No public money or property shall be appropriated for or applied to any religious

[1] Letters of consent to the filing of this brief have been lodged with the Clerk. No counsel for a party in this case authored this brief in whole or in part and no person or entity other than the amici or their counsel made a monetary contribution to the preparation or submission of this brief.

worship, exercise, or instruction, or to the support of any religious establishment.").

The Michigan Association of School Boards ("MASB") is a voluntary, not-for-profit association of local and intermediate boards of education throughout Michigan, whose membership consists of the boards of education of over 600 local school boards and intermediate school boards in this state. The mission of MASB is to provide quality educational leadership services for all Michigan boards of education, and to advocate for student achievement and public education. MASB supports the use of public tax revenues for the financing of public education and opposes any interpretation of law that weakens Michigan's constitutional provision that strictly prohibits the use of public funds to subsidize or support elementary or secondary private parochial schools through vouchers or other direct or indirect payments. Mich. Const. art. VIII, § 2.

The Minnesota School Boards Association ("MSBA") is a not-for-profit organization representing local boards of education. Although membership is voluntary, all 344 local school boards in Minnesota belong to MSBA. The mission of MSBA is to support, promote, and enhance the work of Minnesota's public school boards. Minnesota's Constitution has a provision substantially similar to the one involved in this case. Minn. Const. art. XIII, § 2 ("In no case shall any public money or property be appropriated or used for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught.").

The New York State School Boards Association ("NYSSBA") is a not-for-profit membership organization incorporated under the laws of the State of New York. NYSSBA has a statutory responsibility to devise "practi-

cal ways and means for obtaining greater economy and efficiency in the administration of school district affairs and projects" on behalf of New York public school districts. N.Y. Educ. Law § 1618 (McKinney 2000). NYSSBA, which represents approximately 695 of the 742 public school districts in New York State, has a long-standing interest in educational policy affecting the administration and operation of public schools and has appeared in the Court as an amicus on a number of occasions.[2] NYSSBA also was one of the original plaintiffs in *Board of Education* v. *Grumet*, 512 U.S. 687 (1994), and represented the petitioners in *Board of Education* v. *Russman*, 521 U.S. 114 (1997). New York's Constitution has a provision substantially similar to the one involved in this case. See N.Y. Const. art. XI, § 3.

The Pennsylvania School Boards Association ("PSBA") is a voluntary, not-for-profit association comprising virtually all of the 501 local school districts and 29 intermediate units of the Commonwealth of Pennsylvania and the members of the school boards of those school districts and intermediate units, as well as community colleges. PSBA was organized in 1895 and was the first school boards association in the nation. In addition to its comprehensive program of member assistance services, PSBA has a long record of legislative and judicial advocacy related to all issues affecting public schools in Pennsylvania. PSBA has a substantial interest in this litigation because Pennsylvania has constitutional provisions prohibiting the use of public school funds for the support of sectarian schools and limiting the use of pub-

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[2] *E.g.*, *Good News Club* v. *Milford Cent. Sch. Dist.*, 533 U.S. 98 (2001); *Mitchell* v. *Helms*, 530 U.S. 793 (2000); *Lamb's Chapel* v. *Ctr. Moriches Sch. Dist.*, 508 U.S. 384 (1993).

lic funds for certain other sectarian purposes. See Pa. Const. art. III, § 15. This case has the potential to substantially weaken Pennsylvania's state constitutional provisions.

The Utah School Boards Association ("USBA") is recognized by Utah statute as an organization and representative of the school boards of Utah. It is a voluntary association representing all forty of the local school districts in the state, as well as the Utah State Board of Education. The Utah Constitution provides: "There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment." Utah Const. art. I, § 4.

The Virginia School Boards Association ("VSBA") is a private, voluntary, nonpartisan organization representing local school boards in Virginia. Membership in the VSBA is voluntary, but every local school board in Virginia is a member. The VSBA's primary mission is the advancement of education through the unique American tradition of local citizen control of, and accountability for, the Commonwealth's public schools. The VSBA joins in this amicus brief because the case has national significance and has the potential substantially to weaken state constitutional provisions that prohibit the use of public funds to support religion. Virginia's constitution contains such a provision, see Va. Const. art. VIII, § 11, and the decision in this case may directly affect the viability of that provision.

The American Association of School Administrators ("AASA"), founded in 1865, is the professional organization for over 14,000 educational leaders across America and in many other countries. AASA's mission is to sup-

port and develop effective school system leaders who are dedicated to the highest quality public education for all children.

The Horace Mann League was founded in 1922 to perpetuate the ideals of Horace Mann, the founder of the American public school system. The League believes that the public school system of the United States is an indispensable agency for the perpetuation of the ideals of our democracy and a necessary unifying and dynamic influence in American life.

The Public Education Network has 80 Local Education Fund members in 31 states and the District of Columbia working on behalf of over 10.6 million children in more than 16,500 schools and 1,220 districts. Its mission is to build public demand and mobilize resources for quality public education for all children through a national constituency of local education funds and individuals.

SUMMARY

In this case Washington State has established a program that makes postsecondary scholarships generally available based on high school performance and financial need but excludes their use for religious instruction. The Washington Constitution compelled this exclusion because, unlike the Establishment Clause, it "prohibits not only the *appropriation* of public money for religious instruction, but also the *application* of public funds to religious instruction." *Witters* v. *Comm'n for the Blind*, 771 P.2d 1119, 1122 (Wash. 1989). The decision not to fund religious instruction even indirectly is one that state and local governments should be allowed to make in the exercise of their spending discretion—whether as a matter of legislative choice or, as here, to implement a state constitutional command. States rightly enjoy wide latitude in determining how to allocate their scarce resources, and the Court has recognized the special importance of state and local flexibility in education spending.

The Washington constitutional provision prohibiting the application of public funds to religious uses is valid as applied in this case. States are generally free to provide more expansive protections than the federal constitution affords and, within the limits of the federal constitution, a state may guarantee stricter separation of church and state than the Establishment Clause requires. The Free Exercise Clause, moreover, does not require a state to fund religious instruction if it elects to fund secular instruction. The government generally is not required to fund the exercise of a constitutional right, even when it funds competing activities; and the denial of funding for religious instruction does not substantially burden the free exercise of religion. Washington's program also is not designed to facilitate private speech, and it does not create a public forum for expressive conduct requiring "equal access." The state's decision to limit the use of scarce public funds to secular educational uses is constitutionally permissible.

ARGUMENT

I. STATES MAY GUARANTEE STRICTER SEPARATION OF CHURCH AND STATE THAN THE FEDERAL CONSTITUTION REQUIRES.

Washington, like at least twenty-six other states,[3] has chosen to protect the religious freedom of its citizens by

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[3] Ariz. Const. art. II, § 12; Cal. Const. art. XVI, § 5; Del. Const. art. X, § 3; Fla. Const. art. I, § 3; Ga. Const. art. I, § 2, ¶ VII; Haw. Const. art. X, § 1; Idaho Const. art. IX, § 5; Ky. Const. § 189; Mass. Const. art. XLVI, Amendments, art. XVIII, § 2; Mich. Const. art. XIII, § 2; Minn. Const. art. XIII, § 2; Mo. Const. art. IX, § 8; Mont. Const. art. X, § 6; Nev. Const. art. XI,

(continued)

guaranteeing stricter separation of church and state than the Establishment Clause requires. Wash. Const. art. I, § 11.[4] Unlike the Establishment Clause, the Washington Constitution "prohibits not only the *appropriation* of public money for religious instruction, but also the *application* of public funds to religious instruction. Herein lies a major difference between [Washington's] state constitution and the establishment clause of the first amendment to the United States Constitution." *Witters*, 771 P.2d at 1122. Absent a conflict with federal constitutional guarantees, see *Widmar* v. *Vincent*, 454 U.S. 263, 277-78 (1981), Washington may provide stricter separation of church and state than the federal constitution requires.[5]

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§ 10; N.M. Const. art. XII, § 3; N.Y. Const. art. XI, § 3; N.D. Const. art. VIII, § 5; Okla. Const. art. II, § 5; Or. Const. art. I, § 5; Pa. Const. art. III, § 15; S.D. Const. art. VI, § 3, art. VIII, § 16; Tex. Const. art. I, § 7; Utah Const. art. I, § 4; Vt. Const. ch. 1, art. III; Va. Const. art. VIII, § 11; Wyo. Const. art. I, § 19.

[4] Art. I, § 11 of Washington's Constitution states:

> RELIGIOUS FREEDOM. Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.

[5] Consistent with its decision to provide greater protection for religious freedoms than are contained in the federal Establishment and Free Exercise Clauses, the Washington Supreme Court has also extended greater protection under its version of

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It is axiomatic that state constitutions may offer more expansive protections than the federal constitution affords, as long as those expanded protections do not trench on federal constitutional rights. "Within our federal system the substantive rights provided by the Federal Constitution define only a minimum." *Mills* v. *Rogers*, 457 U.S. 291, 300 (1982). "[S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protections to individual rights than do similar provisions of the United States Constitution." *Arizona* v. *Evans*, 514 U.S. 1, 8 (1995). Thus, for example, the Court has held that states may provide greater First Amendment protections than the federal constitution requires, where those protections did not result in violations of other constitutional guarantees. *Pruneyard Shopping Ctr.* v. *Robins*, 447 U.S. 74 (1980). In reviewing state action challenged as unconstitutional, moreover, the Court has shown particular solicitude for state constitutional guarantees. See *Gregory* v. *Ashcroft*, 501 U.S. 452, 471 (1991) ("In this case, we are dealing not merely with government action, but with a state constitutional provision approved by the people of Missouri as a whole. This constitutional provision reflects both the considered judgment of the state legislature that proposed it and that of the citizens of Missouri who voted for it.").

Although the Establishment Clause permits a state to provide individuals with funds that they may use to pay

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the Free Exercise Clause than the federal Constitution requires. See *First Covenant Church of Seattle* v. *City of Seattle*, 840 P.2d 174 (Wash. 1992) (rejecting Free Exercise standard set in *Employment Div.* v. *Smith*, 494 U.S. 872 (1990), in favor of more religion-protective rule).

for religious instruction, the Free Exercise Clause does not *require* a state to do so as a condition of providing funding for secular instruction. The Free Exercise Clause does not generally preclude states from implementing stricter separation of church and state than the Establishment Clause requires. The requirements of each Clause are not merely the flip side of the requirements of the other, such that any attempt to afford stronger protections than are required by one automatically results in a violation of the other. Thus, the Court has stated that "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Walz* v. *Tax Comm'n*, 397 U.S. 664, 673 (1970). And in *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1 (1989), eight members of the Court disclaimed interpreting the requirements of the Free Exercise Clause as simply the obverse of the prohibitions of the Establishment Clause.

In holding that the Establishment Clause prohibited a state from exempting, from an otherwise applicable tax, religious organizations whose publications were of a religious nature, the *Texas Monthly* plurality disclaimed suggesting that government benefits "are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause," *id.* at 18 n.8 (Brennan, J., joined by Marshall & Stevens, JJ.), while the concurrence separately affirmed the importance of not interpreting the Clauses in a manner "that negates the legislative role altogether," *id.* at 28 (Blackmun, J., joined by O'Connor, J., concurring in the judgment). The dissent similarly argued against any interpretation of the Clauses that "would completely block off the already narrow 'channel between the Scylla [of what the Free Exercise Clause demands] and the Charybdis [of what the Establishment Clause forbids].'" *Id.* at 42 (Scalia, J., joined by Rehnquist, C.J. & Kennedy, J., dissenting)

(quoting *Thomas* v. *Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 721 (1981) (Rehnquist, J., dissenting)).

Indeed, in *Witters* v. *Washington Department of Services for the Blind*, 474 U.S. 481 (1986), the Court appeared to recognize implicitly that a state might do what Washington has done here. Although the Court in that case held that the Establishment Clause did not prohibit Washington from granting vocational assistance to one pursuing a religious calling, the Court remanded the case for consideration of the applicability of "the 'far stricter' dictates of the Washington State Constitution." *Id.* at 489 (quoting *Witters* v. *Comm'n for the Blind*, 689 P.2d 53, 55 (Wash. 1984)). Cf. *Smith*, 494 U.S. at 890 (stating that states may accommodate the religious use of peyote in their drug laws even though the Free Exercise Clause does not require them to do so).

The Court's recognition of state authority to confer protections beyond those mandated by the federal constitution is consistent with respect for the "federalism prerogatives of the states," *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 679 (2002) (Thomas, J., concurring), and with the need, exemplified by this case, to avoid "handcuff[ing] the State's ability to experiment with education," *id.* at 680. "[S]uch federalism concerns," as Judge McKeown wrote, "should [not] represent a one-way street when it comes time for a state to decide whether to enter the ill-defined terrain of the Establishment Clause jurisprudence." App. 49a-50a (dissenting opinion). States thus should be able to provide greater protection for religious freedom than the Constitution requires by prohibiting indirect funding that the Establishment Clause allows. If states were permitted to treat the funding of sectarian and non-sectarian pursuits differently only when the Establishment Clause required

them to do so, "[t]he upshot would be to deny the states any room whatsoever for their own church-state policy . . . . It is hard to imagine a doctrine more hostile to notions of respect for state law, and in particular to the tradition of independent state constitutional law." Ira C. Lupa & Robert W. Tuttle, *Zelman's Future: Sectarian Providers, and the Next Round of Constitutional Battles*, 78 Notre Dame L. Rev. 917, 965-66 (2003).

II. DENYING PUBLIC FUNDING FOR RELIGIOUS INSTRUCTION DOES NOT OFFEND THE FREE EXERCISE CLAUSE.

The Free Exercise Clause prohibits government interference with an individual's free exercise of religion. It is a limitation on governmental intrusion, not a requirement of affirmative government support. The court below accordingly recognized that the Free Exercise Clause does not generally require the government to subsidize respondent's pursuit of religious instruction. App. 17a-18a. It held, however, that Washington's scholarship program violates the Free Exercise Clause because it denies respondent a benefit available to others based on the religious nature of his pursuit. App. 8a. Under this Court's cases, however, Washington is not required to fund religious educational pursuits if it funds secular educational pursuits.

A. States Have Broad Latitude in Public Funding Choices.

Government has wide discretion in distributing public funds to subsidize programs for the general welfare. "[W]hen the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust* v. *Sullivan*, 500 U.S. 173, 194 (1991). "So long as legislation does not infringe on constitutionally protected rights, [government] has wide

latitude to set spending priorities." *Nat'l Endowment for the Arts* v. *Finley*, 524 U.S. 569, 588 (1998). As long as the government does not "discriminate invidiously in its subsidies in such a way as to "aim[ ] at the suppression of dangerous ideas," *Regan* v. *Taxation with Representation*, 461 U.S. 540, 548 (1983) (quoting *Cammarano* v. *United States*, 358 U.S. 498, 513 (1959)), its "selection of particular entities or persons for entitlement to this sort of largess" is "a matter of policy and discretion," *id.* at 549 (quoting *United States* v. *Realty Co.*, 163 U.S. 427, 444 (1896)). In providing that public funds may be used for secular but not religious instruction, Washington has not "aimed at the suppression of dangerous ideas," *Cammarano*, 358 U.S. at 513; the state has "merely chosen to fund one activity to the exclusion of another." *Rust*, 500 U.S. at 193; see *Finley*, 524 U.S. at 588 (in funding activities that it favors without funding competing activities, "'the Government has not discriminated on the basis of viewpoint'") (quoting *Rust*, 500 U.S. at 193).[6]

Latitude in spending decisions is a critical component of the states' role, within constitutional limitations, as "laboratories" in our federal system: "It is one of the happy accidents of the federal system that a . . . state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). When there is disagreement about how best to achieve a

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[6] "It is preposterous to equate the denial of taxpayer subsidy with measures 'aimed at the *suppression* of dangerous ideas.'" see also *Finley*, 524 U.S. at 596 (Scalia, J., joined by Thomas, J., concurring in the judgment) (quoting *Taxation with Representation*, 461 U.S. at 550)).

societal goal, "the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *United States* v. *Lopez*, 514 U.S. 549, 581 (1995); see also *Printz* v. *United States*, 521 U.S. 898, 918-22 (1997).

The Court has recognized the particular need for latitude in the context of educational funding, noting that the judiciary "lack[s] both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues." *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 41 (1973); see also *Milliken* v. *Bradley*, 418 U.S. 717 (1974). Thus, the Court has admonished that "the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions." *Rodriguez*, 411 U.S. at 42-43; see also *Simmons-Harris*, 536 U.S. at 679 (Thomas, J., concurring).

B. States Are Not Required To Fund the Exercise of Constitutional Rights.

Respondent has no personal entitlement to funds from the state to support his religious vocational training. The Court has consistently rejected "the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.'" *Taxation with Representation*, 461 U.S. at 546 (quoting *Cammarano*, 358 U.S. at 515 (Douglas, J., concurring)). Thus, the Free Exercise Clause "affords an individual protection from certain forms of governmental compulsion," *Lyng* v. *N.W. Indian Cemetary Protective Ass'n*, 485 U.S. 439, 448 (1988), but it does not give an individual a right to

public funding of his or her religious pursuits: "[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *United States* v. *Am. Library Ass'n, Inc.*, 123 S. Ct. 2297, 2308 (2003) (plurality opinion) (quoting *Rust*, 500 U.S. at 193 (alteration in original)). Like the Due Process Clause, the Free Exercise Clause "affords protection against unwarranted government interference with freedom" but "does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." *Harris* v. *McRae*, 448 U.S. 297, 317-18 (1980).

C. Denial of Funding for Religious Instruction Does Not Substantially Burden Free Exercise.

Contrary to the Ninth Circuit, Washington's decision to exclude religious vocational training from its subsidy program is not "a law restrictive of religious practice." App. 13a (quoting *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 546 (1993)). "A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *Am. Library Ass'n*, 123 S. Ct. at 2308 (quoting *Rust*, 500 U.S. at 193); see also *Finley*, 524 U.S. at 587-88 ("[A]lthough the First Amendment certainly has application in the subsidy context, we note that Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake."); *id.* at 595-99 (Scalia, J., joined by Thomas, J., concurring in the judgment). Nor is Washington denying a benefit to individuals because they have exercised a constitutional right, as the Ninth Circuit supposed, see App. 18a; the state has simply declined to fund the exercise of that right, see *Maher* v. *Roe*, 432 U.S. 464, 474 (1977).

The Ninth Circuit relied on two Free Exercise cases involving direct governmental prohibitions—*Lukumi* and

McDaniel v. *Paty*, 435 U.S. 618 (1978)—which, in turn, rely upon the principles of *Sherbert* v. *Verner*, 374 U.S. 398 (1963). App. 13a-18a. These cases are inapposite.

Unlike this case, *Sherbert* involved a "substantial" burden on Free Exercise rights, see *Smith*, 494 U.S. at 883-84, compounded by discrimination among religions, see *Sherbert*, 374 U.S. at 406. In *Sherbert*, there was a real concern that the state's law precluded the individual not only from receiving unemployment compensation but also from ever obtaining another job so long as she continued to exercise her religious beliefs. See 374 U.S. at 404. By contrast, as Judge McKeown observed, "Davey has sustained no substantial burden; he continues to pursue his double major in Pastoral Studies and Business Management." App. 39a (dissenting opinion). Unlike the plaintiff in *Sherbert*, who was left unemployed, uncompensated, and ultimately unemployable, the only way in which respondent "suffers" is that the state will not pay for his continuing religious vocational training. The Court has previously distinguished the government's refusal to subsidize particular protected activity from *Sherbert*'s "broad disqualification from receipt of public benefits." *Harris*, 448 U.S. at 317 n.19.

In *McDaniel*, the plaintiff was forced to choose between the free exercise of his religious beliefs and the exercise of his constitutional right to hold public office. See 435 U.S. at 626 ("[T]he State has conditioned the exercise of one on the surrender of the other."). Respondent has not been forced to choose between two competing constitutional rights. Washington's program leaves respondent free to pursue religious instruction. That he must do so using private resources does not render the state's program unconstitutional. *Maher*, 432 U.S. at 474-76; see also *Am. Library Ass'n*, 123 S. Ct. at 2308 n.6 ("The invalidated state action in [political patronage cases] involved true penalties, such as denial of a promotion or outright discharge from employment, not nonsubsidies."); *Harris*, 448 U.S. at 314-16 (state spending choice that may encourage an individual to forego the exercise of a protected right does not impermissibly restrict the exercise of that right).

The Promise Scholars program does not disqualify individuals like Davey from seeking religious vocational training; it simply will not fund religious training. Nothing in the program prohibits those with religious vocational aspirations from using a Promise Scholarship to obtain a different degree. Nothing in the program prohibits those who have received Promise Scholarships from seeking a religious vocational degree at a separate institution, thereby both receiving Promise Scholarship funding and pursuing a religious vocational degree with private funding. Nothing in the program prohibits attendance at religious schools or enrollment in religious classes. The only limitation on conduct from the grant of public funds is that Washington will not itself pay for the conferral of a religious vocational degree.

Finally, *Lukumi* is inapposite. As the Ninth Circuit itself recognized, the Promise Scholars program "neither prohibits religious conduct nor does its application turn on the student's religious motivation. In this respect we agree . . . that the Washington statute differs from the *Lukumi* ordinances." App. 14a. The law in *Lukumi* was a direct criminal prohibition against the particular animal sacrifice practices of a specific religious minority. See 508 U.S. at 525-27. The Court noted the existence of discriminatory animus by the Hialeah City Council and found that "suppression of the central element of the Santeria worship service was the object of the ordinances." See *id.* at 534. Washington's Promise Scholars program is a public subsidy, not a criminal penalty. It

does not target any specific religious practice or religious group. And it places no barrier to individuals attaining a degree in religious vocational studies.

D. The Promise Scholars Program Is Not a Public Forum Requiring Equal Access.

In concluding that Washington's program was unconstitutional the Ninth Circuit relied heavily on *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), and other public forum cases, App. 18a-21a, but the court's reliance on such cases was misplaced. The court believed that *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533 (2001), supported reliance on those cases in the subsidy context, App. 20a-21a, but the Court in *Valazquez* treated *Rosenberger* as pertinent only because, like the program in *Rosenberger*—but unlike the Scholars Program—the LSC program at issue in that case "was designed to facilitate private speech." 531 U.S. at 542. In creating the Scholars Program, Washington has not undertaken to facilitate private speech or create a public forum.

To create a non-traditional public forum, "the government must make an affirmative choice to open up its property for use *as* a public forum." *Am. Library Ass'n*, 123 S.Ct. at 2305 (emphasis added). "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse." *Id.* (quoting *Cornelius* v. *NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985)); accord *Int'l Soc'y of Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 678 (1992). In creating the Promise Scholars program, Washington did not purposely establish a "forum for public discourse." It created the program to help qualified applicants obtain college degrees.

Like the Internet access provided in *American Library Ass'n*, the Washington program provides scholarships "not to 'encourage a diversity of views from private speakers' but . . . to facilitate research [and] learning." 123 S. Ct. at 2305 (quoting *Rosenberger*, 515 U.S. at 834 (1995)). And just as the fact that it is a center of First Amendment activity does not render a library's provision of Internet access a public forum, so the fact that "expressive conduct, creative inquiry, and the free exchange of ideas are what the educational enterprise is all about," App. 20a, does not render Washington's scholarship program a public forum.

In *Rosenberger*, 515 U.S. 819, by contrast, the university was found to have established a limited public forum. The purpose of the student activity funds in that case was to "open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life." *Id.* at 840. In fact, all of the Court's public forum cases involve access to school facilities that the government has opened for speech. See *Good News Club*, 533 U.S. at 108 (school facilities opened to private expressive activity); *Lamb's Chapel*, 508 U.S. at 393 (school property opened "for the presentation of all views about family issues"); *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 41 (1983) (local associations seeking access to inter-school mail system for communication); *Widmar*, 454 U.S. at 271 n.10 (university's "avowed purpose" was "to provide a forum in which students can exchange ideas"). *Valazquez* and *Rosenberger* are therefore inapposite.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

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IN THE

Supreme Court of the United States

GARY LOCKE, Governor of the State of Washington, *et al.*,
Petitioners,

v.

JOSHUA DAVEY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* SUPPORTING PETITIONER

This brief *amicus curiae* is filed by the National Education Association with the written consent of the parties, as provided for in the Rules of this Court.[1]

INTEREST OF THE *AMICUS CURIAE*

The National Education Association ("NEA") is a nationwide employee organization with more than 2.7 million members, the vast majority of whom are employed by public school districts, colleges, and universities throughout the United States. As a matter of organizational policy, NEA is opposed to any arrangement pursuant to which public funds are used to pay for students to attend sectarian schools or are otherwise used for religious education. Consistent with this policy, NEA supports state statutory and constitutional provisions—such as those in the State of Washington—that preclude the public funding of religious education, and NEA is committed to defending those provisions against constitutional challenges such as the one brought by the plaintiff-respondent in this case.

SUMMARY OF ARGUMENT

I. The question presented in this case is whether the United States Constitution *requires* a State to fund an individual's religious college education when the State funds secular college education. The answer is "no."

(a) The only case on point that has reached this Court is *Brusca v. Missouri*, 405 U.S. 1050 (1972), summarily and

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[1] Counsel for a party has not authored this brief in whole or in part. No person or entity other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or filing of this brief.

unanimously affirming 332 F. Supp. 275 (E.D. Mo. 1971) and the three-judge district court's rejection therein of the "parent-plaintiffs[']claim to be entitled, as a matter of federal constitutional right, to tax-raised funds for the purpose of affording a religious [private school] education to their children" when the State provided children a secular public school education, *id.* at 276-77.

(b) In *Maher v.* Roe, 432 U.S. 464 (1977), this Court rejected the claim that "the Constitution requires a . . . State to pay for nontherapeutic abortions when it pays for childbirth." *Id.* at 466. In so doing, the *Maher* Court set out an analytical framework for judging affirmative-obligation-to-fund-constitutionally-protected-activity claims such as the claim there, the claim in *Brusca* and the claim in this case. Noting that such claims "present[ ] a question arising under the Equal Protection Clause of the Fourteenth Amendment," 432 U.S. at 470, this Court instructed that "[w]e must decide, first, whether [the funding refusal] operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. . . . If not, the [funding refusal] must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination." *Id.* (internal quotations omitted).

(c) Applying the analytical framework set out in *Maher* to the plaintiff's-respondent's claim in this case that Washington must fund his religious college education when the State funds secular college education, it is plain that the claim fails.

First, a low-income individual desiring a religious education "does not come within the limited category of [suspect] classes so recognized by [this Court's] cases." *Compare Maher*, 432 U.S. at 471-72.

Second, Washington's refusal to fund the plaintiff's-respondent's religious college education does not impinge upon his constitutionally protected right freely to exercise his religion. The funding refusal raises no obstacle to, places no restriction on, and does nothing to increase the difficulty of, obtaining a religious college education, and plaintiff-respondent "suffers no disadvantage as a consequence of [Washington's] decision to fund [secular college education]; [he simply] continues as before to be dependent on private sources for the [religious college education he] desires." *Compare Maher*, 432 U.S. at 474. Because such a funding refusal does not "penalize" the plaintiff's-respondent's constitutional right to the free exercise of religion, cases like *Sherbert v. Verner*, 374 U.S. 398 (1963) and *McDaniel v. Paty*, 435 U.S. 618 (1978) are "inapplicable here." *Compare Maher*, 432 U.S. at 474-75 n.8.

Third, Washington's decision not to provide public funding for religious education—as embodied in Article I, § 11 of its Constitution—is a decision "fraught with judgments of policy and value" that easily passes constitutional muster "under the less demanding test of rationality that applies" to public funding decisions in general and public funding decisions embodied in state constitutional provisions in particular. *Compare Maher*, 432 U.S. at 478-79; *see also Gregory v. Ashcroft*, 501 U.S. 452, 471 (1991). Washington's decision rationally furthers a number of legitimate purposes, including: (i) honoring the Jeffersonian principle that taxpayers should not be compelled to support any religious exercise whatsoever, and its corollary that, with respect to financing, religion should be wholly voluntary and the government should neither help nor interfere; (ii) avoiding religiously based social conflict; and (iii) maintaining religious institutions as independent, self-governing, bodies.

II. *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995) and *Legal Services Corp. v.*

Velazquez, 531 U.S. 533 (2001) do not support the proposition that Washington's refusal to fund the plaintiff's-respondent's religious college education impinges upon his constitutionally protected right freely to exercise his religion, as the Court of Appeals surmised.

In both cases, the government was deemed to have impinged upon the right of free speech through funding refusals that served to "distort" government funded systems for "facilitat[ing] private speech" by "prohibit[ing] speech necessary to the ['usual' and] proper functioning of those [free speech] systems." *See Velasquez*, 531 U.S. at 542-44.

There is no basis in either *Rosenberger* or *Velasquez*, in any other decision of this Court, in accepted practice, or in reason, for the proposition that where, as here, a State decides to establish a college scholarship program, the State is required to publicly fund study in all the myriad fields of higher education, and that its determination not to fund religious college education "distorts" the overall scholarship program or interferes with "the usual and proper functioning of " the program.

ARGUMENT

The State of Washington Promise Scholarship Program awards publicly funded scholarships to eligible students pursuing a college degree. *See* Wash. Rev. Code 28B.119.010. At the same time—consonant with Article I, § 11 of the Washington Constitution which states that "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction . . ."—the Washington Program provides that "scholarships may not be awarded to any student who is pursuing a degree in theology," Wash. Rev. Code 28B.119.010(b)(8). *See also* Wash. Rev. Code 28B.10.814 ("No aid shall be awarded to any student who is pursuing a degree in theology.").

The plaintiff-respondent in this case challenges Washington's refusal to fund his religious college education when the State funds secular college education as violative of the United States Constitution. That challenge fails—as we now show.

I.

In general, the Bill of Rights to the United States Constitution places negative constraints on actions by the government—including governmental action to facilitate a private individual's activity—but does not place affirmative obligations on the government to take action—either to facilitate a private individual's activity or otherwise.

Not surprisingly, then, this Court has on numerous occasions during the last half-century been faced with some variation of the "difficult question[ ]," *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 485 (1986), of whether the Constitution *prohibits* a State from funding an individual's religious private school education. *See Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters*, *supra*; *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

It is equally unsurprising that, during this same period, the Court has had only one case raising the entirely different question of whether the Constitution *requires* a State to fund an individual's religious private school education. That case was *Brusca v. Missouri*, 405 U.S. 1050 (1972), in which a three-judge district court had unanimously rejected the "parent-plaintiffs[']claim to be entitled, as a matter of federal constitutional right, to tax-raised funds for the purpose of affording a religious [private school] education to their children" when the State provided children a secular public school education. *See* 332 F. Supp. 275, 276-77 (E.D. Mo. 1971). This Court did not find the question presented in that

case to be a difficult one: it summarily, and unanimously, affirmed the decision of the lower court.

As is the norm, the summary affirmance in *Brusca* was not accompanied by an opinion setting out the Court's basis for rejecting the affirmative-obligation-to-fund-constitutionally-protected-activity claim in that case. But shortly thereafter, the analytical framework for judging such claims was set out in detail in Justice Powell's opinion for the Court in *Maher v. Roe*, 432 U.S. 464 (1977). The *Maher* Court set out that analyses in rejecting the claim—indistinguishable for present purposes from the claim asserted in *Brusca* and in the instant case—that "the Constitution *requires* a participating State [in the joint federal-state Medicaid program] to pay for nontherapeutic abortions when it pays for childbirth." *Id.* at 466 (emphasis added). The *Maher* analysis confirms the conclusion reached in *Brusca*, and leads to the same conclusion here.

II.

Maher involved a Connecticut Medicaid regulation providing that the State would fund the medical expenses of indigent women incident to childbirth, but would *not* fund the medical expenses of indigent women incident to nontherapeutic abortions. The plaintiffs in *Maher* challenged the constitutionality of the State's regulation on the theory "that Connecticut must accord equal treatment to both abortion and childbirth, and may not evidence a policy preference by funding only the medical expenses incident to childbirth." 432 U.S. at 470.

"This challenge," the *Maher* Court stated, "presents a question arising under the Equal Protection Clause of the Fourteenth Amendment." 432 U.S. at 470. "The basic framework of analysis of such a claim," the Court noted, "is well settled":

> "We must decide, first, whether [the funding refusal] operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. . . . If not, the [funding refusal] must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination . . . ." [*Id.* (quoting *San Antonio School Dist. v. Rodriquez*, 411 U.S. 1, 17 (1973)) (ellipsis by Court).]

The Court then followed this framework in analyzing the *Maher* plaintiffs' claim.

1. The *Maher* Court first considered and found utterly wanting the suggestion that Connecticut's refusal to fund nontherapeutic abortions "operate[d] to the disadvantage of some suspect class," 432 U.S. at 470, stating that "[a]n indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our cases," *id.* at 470-71. "[T]he fact that the impact of the [Connecticut] regulation falls upon those who cannot pay," the Court added, does not "lead to a different conclusion." *Id.* at 471.

2. The *Maher* Court then turned to what it characterized as "the central question in this case"—*i.e.*, whether the Connecticut regulation refusing to fund nontherapeutic abortions impinged upon the fundamental right to an abortion protected by the Due Process Clause of the Fourteenth Amendment as recognized in *Roe v. Wade*, 410 U.S. 113 (1973). *See Maher*, 432 U.S. at 471.

And, the Court answered this "central question" in the negative:

> The Connecticut regulation [refusing to fund nontherapeutic abortions] places *no* obstacles—absolute or otherwise—in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers *no* disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be

> dependent on private sources for the services she desires. The State may have made childbirth a more attractive alternative [by funding medical expenses incident thereto], thereby influencing the woman's decision, but it has imposed *no* restriction on access to abortions that was not already there. The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation. [432 U.S. at 474 (emphasis added).]

Simply put, the Connecticut funding regulation did not impinge upon the constitutionally protected right to an abortion because the regulation raised no obstacle to, placed no restriction on, and did nothing to increase the difficulty of, obtaining an abortion—in a word, the State's no-public-funding determination created no disadvantage for women desiring an abortion.

In so holding, the *Maher* Court rejected as "misplaced" the plaintiffs' reliance on the Court's prior decisions in *Shapiro v. Thompson*, 394 U.S. 618 (1969) and *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), in which "durational residence requirements for the receipt of public benefits were found to be unconstitutional because they 'penalized' the exercise of the constitutional right to travel interstate." 432 U.S. at 474 n.8. The Court explained:

> . . . Penalties are most familiar to the criminal law, where criminal sanctions are imposed as a consequence of proscribed conduct. *Shapiro* and *Maricopa County* recognized that denial of welfare to one who had recently exercised the right to travel across state lines was sufficiently analogous to a criminal fine to justify strict judicial scrutiny.
>
> If Connecticut denied general welfare benefits to all women who had obtained abortions and who were otherwise entitled to the benefits, we would have a close analogy to the facts in *Shapiro*, and strict scrutiny might

> be appropriate under either the penalty analysis or the analysis we have applied in our previous abortion decisions. But the claim here is that the State "penalizes" the woman's decision to have an abortion by refusing to pay for it. *Shapiro* and *Maricopa County* did not hold that States would penalize the right to travel interstate by refusing to pay the bus fares of the indigent travelers. [*Id.* at 474-75 n.8.]

The *Maher* Court tersely added that "*Sherbert v. Verner*, 374 U.S. 398 (1963), similarly is inapplicable here." 432 U.S. at 474-75 n.8. But the Court's decision in *Harris v. McRae*, 448 U.S. 297 (1980)—rejecting a federal constitutional challenge to the so-called "Hyde Amendment," which limits Medicaid's provision authorizing the funding of medically necessary services generally by denying authorization for the funding of certain medically necessary abortions—elaborates at some length on why *Sherbert* "similarly is inapplicable":

> A substantial constitutional question would arise if Congress had attempted to withhold all Medicaid benefits from an otherwise eligible candidate simply because that candidate had exercised her constitutionally protected freedom to terminate her pregnancy by abortion. This would be analogous to *Sherbert v. Verner*, 374 U.S. 398, where this Court held that a State may not, consistent with the First and Fourteenth Amendments, withhold *all* unemployment compensation benefits from a claimant who would otherwise be eligible for such benefits but for the fact that she is unwilling to work one day per week on her Sabbath. But the Hyde Amendment, unlike the statute at issue in *Sherbert*, does not provide for such a broad disqualification from receipt of public benefits. Rather, the Hyde Amendment, like the Connecticut welfare provision at issue in *Maher*, represents simply a refusal to subsidize certain protected conduct. [448 U.S. at 317 n.19 (emphasis in original).]

The nub of the matter, said the *Harris* Court, is this: "A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *Id.* at 317 n.19. And, the rulings in *Sherbert v. Verner*, *Shapiro v. Thompson* and *Memorial Hospital v. Maricopa County* are for this reason wholly consistent with the rulings in *Maher* and its progeny—*i.e.*, that an equal protection affirmative-obligation-to-fund-constitutionally-protected-activity claim is *not* subject to a strict scrutiny analysis.

3. Having answered "no" to the first two questions posed by the *Maher* plaintiffs' constitutional claim, the Court turned to the "question [that] remains"—*i.e.*, whether "the Connecticut funding scheme" passes constitutional muster "under the less demanding test of rationality that applies in the absence of a suspect classification or the impingement of a fundamental right." 432 U.S. at 478. The Court answered this question "yes."

The Court began by setting out the standard for evaluation:

> Our cases uniformly have accorded the States a wide[ ] latitude in choosing among competing demands for limited public funds. In *Dandridge v. Williams*, 397 U.S. [471,] 485 [(1970)], despite recognition that laws and regulations allocating welfare funds involve "the most basic economic needs of impoverished human beings," we held that classifications survive equal protection challenge when a "reasonable basis" for the classification is shown. [432 U.S. at 479 (footnote omitted).]

Applying this standard to Connecticut's regulation, the Court concluded that the regulation did have a "reasonable basis": "[T]he state interest in encouraging normal childbirth [in lieu of nontherapeutic abortion] exceeds this minimal level." 432 U.S. at 479. In this regard, the Court emphasized that where the decision of whether to fund *vel non* involves

sensitive considerations of policy and value, that decision is committed to the legislature with only the most limited and deferential judicial review:

> The decision whether to expend state funds for nontherapeutic abortion is fraught with judgments of policy and value over which opinions are sharply divided. Our conclusion that the Connecticut regulation is constitutional is not based on a weighing of its wisdom or social desirability, for this Court does not strike down laws because they may be unwise, improvident, or out of harmony with a particular school of thought. Indeed, when an issue involves policy choices as sensitive as those implicated by public funding of nontherapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature. [*Id.* at 479 (internal quotations, citations and footnote omitted).]

4. The general principle that governs affirmative-obligation-to-fund-constitutionally-protected-activity claims is most succinctly stated in *Harris v. McRae*: "Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." 448 U.S. at 317-18. As the *Harris* Court explained:

> To hold otherwise would mark a drastic change in our understanding of the Constitution. It cannot be that because government may not prohibit the use of contraceptives, *Griswald v. Connecticut*, 381 U.S. 479, or prevent parents from sending their child to a private school, *Pierce v. Society of Sisters*, 268 U.S. 510, government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools. To translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation would require

> Congress to subsidize the medically necessary abortion of an indigent woman even if Congress had not enacted a Medicaid program to subsidize other medically necessary services. [*Id.* at 318.]

And, as the *Harris* Court concluded: "Nothing in the Due Process Clause supports such an extraordinary result. *Whether freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer, not a matter of constitutional entitlement.*" *Id.* (emphasis added) (footnote omitted).

Subsequent to *Harris*, the Court has applied this principle to reject affirmative-obligation-to-fund-constitutionally-protected-activity claims in *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540 (1983) and *Rust v. Sullivan*, 500 U.S. 173 (1991).

Regan involved a constitutional challenge to Congress' refusal to grant a tax exemption to charitable organizations engaged in substantial lobbying when Congress had granted a tax exemption to veterans' organizations engaged in such lobbying. The Court rejected this challenge, stating:

> We have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny. *Buckley v. Valeo*, 424 U.S. 1 (1976), upheld a statute that provides federal funds for candidates for public office who enter primary campaigns, but does not provide funds for candidates who do not run in party primaries. We rejected First Amendment and equal protection challenges to this provision without applying strict scrutiny. *Id.*, at 93-108. *Harris v. McRae, supra*, and *Maher v. Roe*, 432 U.S. 464 (1977), considered legislative decisions not to subsidize abortions, even though other medical procedures were subsidized. We declined to apply strict scrutiny and rejected equal protection challenges to the statutes. [461 U.S. at 549.]

And, as the *Regan* Court added:

> The reasoning of these decisions is simple: "although government may not place obstacles in the path of a [person's] exercise of . . . freedom of [speech], it need not remove those not of its own creation." *Harris*, 448 U.S., at 316. Although [respondent] does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution "does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." *Id.*, at 318. [461 U.S. at 549-50 (ellipsis by Court).]

Rust, in its turn, involved a constitutional challenge to Congress' refusal to fund private counseling "concerning the use of abortion as a method of family planning" when Congress provided funds for private family planning services generally. The Court rejected this challenge as well:

> Petitioners' assertions ultimately boil down to the position that, if the Government chooses to subsidize one protected right, it must subsidize analogous counterpart rights. But the Court has soundly rejected that proposition. *Regan v. Taxation with Representation of Wash.*, *supra*; *Maher v. Roe*, *supra*; *Harris v. McRae*, *supra*. Within far broader limits than petitioners are willing to concede, when the Government appropriates public funds to establish a program it is entitled to define the limits of that program. [500 U.S. at 194.]

III.

In this case, the plaintiff-respondent claims that Washington is required to fund his religious college education when the State funds secular college education. Like the claims of the *Maher*, *Harris*, *Regan* and *Rust* plaintiffs, this claim "presents a question arising under the Equal Protection Clause of the Fourteenth Amendment." *Maher*, 432 U.S. at

470. Applying the "well settled" framework for analyzing such claims, *id.*, the plaintiff's-respondent's claim fails—just as those plaintiffs' claims were held to fail.

1. The Court never has recognized individuals desiring a religious education as a "discrete and insular minority" that constitutes a suspect class. There is no basis in reason or experience for "deem[ing]" laws that do not provide public funding to individuals desiring a religious education as laws "reflect[ing] prejudice and antipathy" against a "politically powerless" class that lacks the means to prevent or "rectif[y]" discrimination against the class through normal democratic processes. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, 445 (1985).

That being so, it follows from the *Maher* Court's holding that "[a]n indigent woman desiring an abortion does not come within the limited category of [suspect] classes so recognized by [the Court's] cases," 432 U.S. at 470-71, and the *Cleburne* Court's holding that mentally retarded persons are not a suspect class, *see* 473 U.S. at 439-47, that low-income individuals desiring a religious education are *not* a suspect class.

2. Thus, "the central question" in this case—*i.e.*, whether Washington's refusal to fund the plaintiff's-respondent's religious college education "impinges upon a fundamental right explicitly or implicitly protected by the Constitution"—parallels "the central question" in *Maher*. *See* 432 U.S. at 470 (internal quotations omitted). And, as in *Maher*, the answer is "no."

a. The Free Exercise Clause of the First Amendment—as made applicable to the States through the Fourteenth Amendment—provides that a State "shall make no law . . . *prohibiting* the free exercise [of religion]." U.S. CONST.

amend. I (emphasis added). As the Court explained in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988):

> The crucial word in the constitutional text is "prohibit": "For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Sherbert, supra*, [374 U.S.] at 412 (Douglas, J., concurring). [485 U.S. at 451.]

Accordingly, a State can not *prohibit* individuals from securing through their own means a religious education for themselves or their children. *See Nyquist, supra*, 413 U.S. at 788 ("[A] state law interfering with a parent's right to have a child educated in a sectarian school would run afoul of the Free Exercise Clause.").

At the same time, as the three-judge district court in *Brusca* put it: "[A] parent's right to choose a religious private school for his children may not be equated with a right to insist that the state is compelled to finance his child's non-public school education in whole or in part in order that he may obtain a religious education." 332 F. Supp. at 277. Accordingly, "the Religion Clauses of the First Amendment . . . *do not require* that [financial aid] be given by the State" to "assist a parent in educating his child religiously." *Id.* at 279 (emphasis added).

To apply the *Maher* Court's words to the matter at hand:

> The [Washington Promise Scholarship Program's refusal to fund religious college education] places *no* obstacles—absolute or otherwise—in the [low income individual's] path to [a religious college education.] [A low income individual] who desires [a religious college education] suffers *no* disadvantage as a consequence of [Washington's] decision to fund [secular college education]; [he/she simply] continues as before to be dependent on private sources for the [religious college education he/she] desires. The State may have made

> [secular college education] a more attractive alternative [by funding it], thereby influencing the [individual's] decision, but it has imposed *no* restriction on access to [religious college education] that was not already there. The [financial constraints] that may make it difficult—and in some cases, impossible—for some [individuals to obtain a religious college education] is neither created nor in any way affected by the [Washington Promise Scholarship Program]. [432 U.S. at 474 (emphasis added).]

b. The Court of Appeals invoked this Court's decision in *McDaniel v. Paty*, 435 U.S. 618 (1978), but that decision is not even apposite here—much less in conflict with *Maher* and its progeny.

The *McDaniel* Court held that "a Tennessee statute barring 'Minister[s] of the Gospel, or priest[s] of any denomination whatever' from serving as delegates to the State's limited constitutional convention deprived appellant McDaniel, an ordained minister, of the right to the free exercise of religion." 435 U.S. at 620 (plurality opinion). The Court rested that holding squarely on *Sherbert v. Verner*, *supra*. As the *McDaniel* plurality explained: "'[T]o condition the availability of benefits [including access to the ballot] upon this appellant's willingness to violate a cardinal principle of [his] religious faith [by surrendering his religiously impelled ministry] *effectively penalizes the free exercise of [his] constitutional liberties*." 435 U.S. at 626 (quoting *Sherbert*, 374 U.S. at 406) (emphasis added); *accord* 435 U.S. at 633 (Brennan, J., concurring).

But as *Maher* and *Harris v. McRae* make abundantly clear, *Sherbert* and its progeny such as *McDaniel*—and their underlying "penalty analysis"—do *not* apply where, as here, the challenged state action is *a refusal to fund a protected religious activity* rather than a refusal to provide a secular benefit (as it were) to a person because that person is, or has,

engaged in protected religious activity. In constitutional terms, there is a world of difference between a State's refusal to provide public funding for an individual's training for the priesthood or the ministry, consistent with *Maher* and its progeny; and a State's refusal to provide a secular benefit to a priest or a minister because of that individual's religious status or activities, contrary to *Sherbert* and *McDaniel*.

As the *Harris* Court succinctly put it: "A refusal to fund protected activity, without more, *cannot be* equated with the imposition of a 'penalty' on that activity." 448 U.S. at 317 n.19 (emphasis added).[2]

3. The "question that remains" is whether Washington's refusal to fund an individual's religious college education when the State funds secular college education passes constitutional muster "under the less demanding test of rationality that applies in the absence of a suspect classification or the impingement of a fundamental right." *Compare Maher*, 432 U.S. at 478. The answer to this question is "yes."

In addressing this question, we begin with the point that the Washington Promise Scholarship Program's refusal to provide funding for religious college education is consonant

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[2] Against this case law background, the Court's cryptic statement in *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 886 n.3 (1990) that the Court "strictly scrutinize[s] governmental classifications based on religion, see *McDaniel v. Paty*, 435 U.S. 618 (1978)," must be taken to mean that the Court strictly scrutinizes governmental classifications based on religion where—as in *McDaniel* but unlike here—the classification impinges upon the fundamental right to the free exercise of religion. *Accord Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) ("Unquestionably, the free exercise of religion is a fundamental constitutional right. However, since we hold in Part III, *infra*, that the Act does not violate appellee's right of free exercise of religion, we have no occasion to apply to the challenged classification a standard of scrutiny stricter than the traditional rational-basis test.").

with—and is plainly intended to give effect to—Article I, § 11 of the Washington Constitution:

> *No* public money or property shall be appropriated for or applied to any religious worship, exercise *or instruction*, or the support of any religious establishment. [WASH. CONST. art. I, § 11 (emphasis added), *reprinted in* Pet. App. at 88a.]

This Court's "reluctan[ce]" to overturn a governmental action that "burdens neither a suspect group nor a fundamental interest" becomes greater still where that governmental action is mandated by "a state constitutional provision approved by the people of [the State] as a whole." *Gregory v. Ashcroft*, 501 U.S. 452, 470-71 (1991). Such a governmental action will not be found to violate the United States Constitution

> "unless the varying treatment of different groups or persons [in the state constitutional provision] is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [people's] actions were irrational." [*Id.* (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)).]

It cannot be gainsaid that Washington's policy decision—as embodied in Article I, § 11 of its Constitution—not to fund religious education with taxpayer dollars is supported by a number of "legitimate purposes," any one of which standing alone suffices to establish the "rationality" of that decision.

One legitimate purpose is to honor both the Jeffersonian principle that no taxpayer should "be compelled to . . . support any religious worship, place, or ministry whatsoever," *see* A Bill for Establishing Religious Freedom, *reprinted in* 5 The Founders' Constitution 84 (P. Kurland & R. Lerner eds. 1987), and its corollary that "[w]ith respect to money, religion [should] be wholly voluntary[;] [c]hurches either [should] support themselves or . . . not, but the government

[should] neither help or interfere," *see* Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875, 923 (1986).

A second legitimate purpose is "avoiding religiously based social conflict" of the kind described in Justice Breyer's dissenting opinion in *Zelman v. Simmons-Harris*, *supra*, 536 U.S. at 717-29. *See also e.g. Everson v. Board of Educ. of Ewing*, 330 U.S. 1, 53 (1947) (Rutledge, J., dissenting) ("Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here one by numbers alone will benefit most, there another.").

And yet a third legitimate purpose is to maintain religious institutions as independent, self-governing bodies, and to avoid their transformation into institutions that must be regulated in the way government-funded entities generally are regulated. "When government aid goes up, so does reliance on it; the only thing likely to go down is independence." *Zelman v. Simmons-Harris*, *supra*, 536 U.S. at 715 (Souter, J., dissenting).

All this being so, the three-judge district court in *Brusca* surely was right in concluding that there was nothing "arbitrary," "unreasonable" or "invidious" in "the determination of the State [of Missouri in its Constitution and implementing statutes] to deny its funds to sectarian schools or for religious instruction." 332 F. Supp. at 279.

By any measure, "[t]he decision whether to expend state funds" on religious education is no less "fraught with judgments of policy and value over which opinions are sharply divided" than "[t]he decision whether to expend state funds" on abortion. *See Maher*, 432 U.S. at 479; *compare Nyquist*, *supra*, 413 U.S. at 797 (noting that the issue "of Church-State relationships" underlying the decision whether to fund religious education—and, if so, on what basis—is both a "divisive" and "deeply emotional" one).

Accordingly, the "wide[] latitude" afforded States "in choosing among competing demands for limited public funds," *Maher*, 432 U.S. at 479, is no less appropriate in the present context than it is in the public funding of abortion context. "[W]hen an issue involves policy choices as sensitive as those implicated by public funding of [religious education]"—and when, as here, the policy choice *not* to fund religious education is embodied in a state constitutional provision—"the appropriate forum . . . in a democracy" for seeking to overturn that policy choice is the state constitutional amendment process and not the judicial process. *Compare id.*

To be sure, implicit in this Court's decision in *Zelman v. Simmons-Harris*, *supra*, is the understanding that the Founders were not of the view that the separation-of-church-and-state considerations enumerated above required a federal constitutional provision precluding any and all uses of public money to fund religious education.

But nothing in *Zelman* can be read to stand for the proposition that the First Amendment's Religion Clauses contain any mandate that the States must fund religious education that overrides state constitutional provisions such as Washington's Article I, § 11.

Nor can anything in *Zelman* be read to suggest that the framers of a state constitution and the people in ratifying that state constitution would be *irrational* in concluding that separation-of-church-and-state considerations do warrant a state constitutional provision—like Washington's Article I, § 11—precluding any and all uses of public money to fund religious education.[3]

[3] Although the Equal Protection Clause inquiry does not turn on whether any, some or all of the separation-of-church-and-state considerations enumerated above "actually motivated" the authors of Article I, § 11 of the Washington Constitution and the people of Washington who ratified that Constitution, *see FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993), we would be remiss if we failed to note that the Jeffersonian principle of respect for freedom of conscience loomed large in this regard. Article 1, § 11 is revealingly entitled "Religious Freedom," and it makes specific reference to "the liberty of conscience *hereby secured*." *See* Pet. App. at 88a (emphasis added). Unsurprisingly, then, the Washington Supreme Court has characterized Article I, § 11 as a provision the purpose and effect of which is to "prohibit[ ] [Washington] taxpayers from being put in the position of paying for the religious instruction of aspirants to the clergy with whose religious views they may disagree." *Witters v. State of Wash. Comm'n for the Blind*, 771 P.2d 1119, 1120 (Wash. 1989).

4. What the foregoing shows is that the three-step analysis detailed in *Maher* leads ineluctably to the conclusion that a State which provides funding for secular college education is *not* required by the Constitution also to provide funding for religious college education. The sum of the matter in *Harris v. McRae* is the sum of the matter here:

> To hold otherwise would mark a drastic change in [the Court's] understanding of the Constitution. . . . To translate the limitation on governmental power [stated in the Free Exercise Clause] into an affirmative funding obligation would require [a State] to subsidize [an individual's religious education] even if [the State would not fund that same individual's secular education]. Nothing in [the Free Exercise Clause] supports such an extraordinary result. *Whether* [*the freedom to obtain a religious education for oneself or one's children*] *that is constitutionally protected warrants subsidization is a question for* [*each State*] *to answer* [*for itself*], *not a matter of* [*federal*] *constitutional entitlement.* [448 U.S. at 317-18 (emphasis added) (footnote omitted).]

IV.

The Court of Appeals read the decisions in *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995) and *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001) as eroding the *Maher/Harris/Regan/Rust* principle that a rationally-based governmental refusal to fund an individual's exercise of a constitutionally protected right does *not* impinge upon that right. And, based on that reading, the court below concluded that Washington's refusal to fund the plaintiff's-respondent's religious college education impinges upon his constitutionally protected right freely to exercise his religion. *See* Pet. App. at 18a-22a.

That is not a tenable reading of *Rosenberger* and *Velasquez*. Those decisions do not call into question the general principle stated in *Maher* and its progeny, or the applicability of that general principle to Washington's refusal to fund the plaintiff's-respondent's religious college education. To the contrary, as we detail below, *Rosenberger* and *Velasquez* constitute a carefully-defined, narrowly-delineated, exception to the *Maher/Harris/Regan/Rust* principle that covers one particular kind of viewpoint-based refusal to fund private speech but does not even go so far as to reach other refusals to fund private speech—much less so far as to reach refusals to fund religious private education.

1. In both *Rosenberger* and *Velasquez*, the government was deemed to have impinged upon the right of free speech through funding refusals that served to "distort" government funded systems for "facilitat[ing] private speech" by "prohibit[ing] speech necessary to the ['usual' and] proper functioning of those [free speech] systems." *See Velasquez*, 531 U.S. at 542-44.

a. In *Rosenberger*, the Court held that the University of Virginia impinged upon the First Amendment right of free speech by creating a limited (financial) public forum for the

expression of "a diversity of views from private speakers," and—in an action the Court deemed inconsistent with the basic free speech postulate of public forum law prohibiting viewpoint discrimination—refusing to fund speakers expressing a particular (*i.e.*, religious) view. *See* 515 U.S. at 834.

In *National Endowment for Arts (NEA) v. Finley*, 524 U.S. 569 (1998), the Court confirmed *Rosenberger's* narrow compass in upholding 20 U.S.C. § 954(d)(1)'s mandate that NEA "take . . . decency and respect for . . . [American] values [into account in funding the arts]" against a facial challenge to the provision as violative of "the First Amendment's prohibition on viewpoint-based restrictions on protected speech," *id.* at 579. The Court rejected the *Finley* plaintiffs' "reliance on our decision in *Rosenberger*" as "misplaced," commenting that

> the inherently content-based "excellence" threshold for NEA support sets it apart from the subsidy at issue in *Rosenberger*—which was available to all student organizations that were "'related to the educational purpose of the University,'" [515 U.S.], at 824—and from comparably objective decisions on allocating public benefits, such as access to a school auditorium or a municipal theater. [524 U.S. at 586.]

And, as the *Finley* Court added:

> [A]lthough the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake. So long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities. . . . And as we held in *Rust*, Congress may "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."

> 500 U.S., at 193. *In doing so, "the Government has not discriminated on the basis of viewpoint, it has merely chosen to fund one activity to the exclusion of the other."* *Ibid.* [524 U.S. at 587-88 (emphasis added).]

Thus, even where the constitutionally protected right at issue is the right of free speech, the principle that rationally-based governmental refusals to fund the exercise of a protected right do not impinge upon that right remains the governing general principle, and *Rosenberger* applies only in the confines of governmentally funded public fora. *See also Finley*, 524 U.S. at 598-99 (Scalia, J., concurring) ("*Rosenberger*, as the Court explains, *ante*, at 586, found the viewpoint discrimination unconstitutional, not because funding of 'private' speech was involved, but because the government had established a limited public forum."). *Accord United States v. American Library Ass'n, Inc.*, 123 S. Ct. 2297, 2305 (2003) (plurality opinion) ("In *Rosenberger*, . . . [w]e held that the fund had created a limited public forum by giving public money to student groups who wished to publish, and therefore could not discriminate on the basis of viewpoint.").

b. *Velasquez*, in turn, involved a legal services program established by Congress to provide funding for attorneys to represent indigent plaintiffs in certain types of litigation against the government—including welfare benefits litigation. The Court held that Congress impinged upon the First Amendment right of free speech when—in an action deemed by the Court to be inconsistent with the basic free speech postulate of the litigation system—Congress refused to fund welfare benefits litigation in which the legal services attorneys would in "the ordinary course of [the] litigation" seek to present "arguments and theories Congress finds unacceptable but which by their very nature are within the province of the courts to consider." 531 U.S. at 546, 548.

The *Velasquez* Court made it plain, however, that "when [Congress funds a legal services program] it [is] not required to fund the whole range of legal representations or relationships." 531 U.S. at 548. Congress can, as it has, fund certain classes of litigation—such as welfare benefits litigation—and refuse to fund others such as "most criminal proceedings and . . . litigation involving nontherapeutic abortions, secondary school desegregation, military desertion, or violations of the Selective Service statute." *Id.* at 537.

In all of these regards, the governing general principle is that rationally-based governmental decisions not to fund the exercise of a constitutionally protected right do *not* impinge upon that right. *Accord American Library Ass'n*, 123 S. Ct. at 2309 (plurality opinion) (applying that general principle to reject a First Amendment free speech challenge to congressional restrictions on the funding of public libraries, and distinguishing *Velasquez* as a case where "[t]he Court concluded that the restriction on [the arguments that legal services attorneys could make in] welfare disputes would distort the usual functioning of the legal profession and the federal and state courts before which the lawyers appeared").

2. In sum, *Rosenberger* and *Velasquez* do not even speak to the question of whether a governmental refusal to fund an individual's religious education impinges upon the protected right freely to exercise religion—much less support the conclusion that Washington's refusal to fund the plaintiff's-respondent's religious education impinges upon his free exercise right.

There is no basis in either *Rosenberger* or *Velasquez*, in any other decision of this Court, in accepted practice, or in reason, for the proposition that when government decides to establish a scholarship program at a particular level of education—*e.g.*, the college level, as here—it is required to publicly fund study in all the myriad fields of education at that level, and that its determination not to fund religious education "distorts" the overall scholarship program or interferes with "the usual and proper functioning of" that program.

To the contrary, as we have shown, a governmental refusal to publicly fund religious college education when the government provides funding for secular college education is a rationally-based policy decision in a highly sensitive area that passes constitutional muster.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

GARY LOCKE, ET AL.,
Petitioners,

v.

JOSHUA DAVEY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* ANTI-DEFAMATION LEAGUE; HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA; JEWISH COUNCIL FOR PUBLIC AFFAIRS; AND THE COMMISSION ON SOCIAL ACTION OF REFORM JUDAISM IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Anti-Defamation League

Organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States, the Anti-Defamation League ("ADL") is today one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. As part of its core beliefs, ADL maintains a deep commitment to the principles of religious liberty that are enshrined in the religion clauses of the First Amendment. Based on nearly a century of advocacy and experience, ADL believes that its mission is best achieved by scrupulous observance of the pro-religion values found in those clauses. ADL insists that the Establishment Clause and the Free Exercise Clause occupy equally paramount places in our constitutional pantheon, and both express values of the highest order and deepest significance to our peoples – yet maintenance of the tension between them is essential to the proper working of our democracy.

In advancing the argument here that the Free Exercise Clause does not *require* government funding of religious education on the same terms as the funding of non-religious education, ADL emphatically rejects the notion that this separation is in any way hostile to religion. To the contrary, the wall of separation permits religious practices

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[1] Pursuant to Rule 37.3(a) of the Rules of this Court, *Amici* have obtained and lodges the written consents of all parties to the submission of this *Amici Curiae* brief. Pursuant to Rule 37.6, *Amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person, other than *Amici* and its counsel, made a monetary contribution to the preparation or submission of this brief.

and beliefs to flourish in America, and protects minority religions and their adherents. The decision of the court of appeals would destroy that separation forever, and would ineluctably entangle state and pulpit. From day-to-day experience serving its constituents, ADL can testify that when government and religion so become entangled, the environment for each grows threatening and problematic. In the familiar words of Justice Black: "A union of government and religion tends to destroy government and degrade religion." *Engel v. Vitale*, 370 U.S. 421, 431 (1962).[2]

Hadassah, the Women's Zionist Organization of America

Hadassah, the Women's Zionist Organization of America, founded in 1912, is the largest women's and Jewish membership organization in the United States, with over 300,000 members nationwide. In addition to Hadassah's long-standing mission of supporting healthcare institutions in Israel, Hadassah has a proud history of advocating for the rights of the Jewish community in the

[2] In furtherance of the beliefs advanced here, ADL has participated in the major religious liberties cases of the last half-century. *See e.g.*, ADL briefs *amicus curiae* filed in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98 (2001); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Boerne v. Flores*, 521 U.S. 507 (1997); *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Lee v. Weisman*, 505 U.S. 577 (1992); *Employment Div. v. Smith*, 494 U.S. 872 (1990); *Witters v. Wash. Dept. of Servs. for the Blind*, 474 U.S. 481 (1986); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Comm. for Public Educ. v. Nyquist*, 413 U.S. 756 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Engel v. Vitale*, 370 U.S. 421 (1962); and *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948).

United States. Hadassah is committed to the fundamental principle of separation of church and state, which has served as a guarantee of religious freedom and diversity. Hadassah opposes government funding of religious education, including funding for the training of clergy.

Jewish Council for Public Affairs

The Jewish Council for Public Affairs ("JCPA"), the coordinating body of 13 national and 122 local Jewish community relations organizations, was founded in 1944 by the Jewish Federation system to safeguard the rights of Jews throughout the world and to protect, preserve, and promote a just society. The JCPA recognizes that the Jewish community has a direct stake – along with an ethical imperative – in assuring that America remains a country wedded to the Bill of Rights and that the wall of separation between church and state is an essential bulwark for religious freedom in the United States.

The Commission on Social Action of Reform Judaism

The Commission on Social Action of Reform Judaism (CSA) is a joint instrumentality of the Union of American Hebrew Congregations (UAHC) and the Central Conference of American Rabbis (CCAR). The 900 congregations of the UAHC encompass 1.5 million Reform Jews, and the membership of the CCAR includes 1,800 Reform rabbis. The CSA establishes policy for the Religious Action Center of Reform Judaism, an office in Washington, D.C. established to advocate for social and political policy in keeping with Jewish law and theology as understood by Reform Judaism.

As Jews, we have long shared in and benefited from America's unparalleled tradition of religious freedom.

After centuries of harassment and persecution in every corner of the globe, we understand and appreciate that for more than two centuries, America's tradition of religious freedom has been a tremendous gift to people of faith. For much of American Jewry, the struggle to protect religious liberty, to ensure that we, and our neighbors, are free to follow the dictates of our conscience, is a core issue. Our history, so often marked by oppression at the hands of societies intolerant of minority religions, has taught us that we have an obligation to protect religion from governmental interference. In 1991, the UAHC and CCAR reaffirmed our conviction that "the separation of church and state is the bulwark of religious freedom." The UAHC, the CCAR, and the CSA have long urged Congress, the Courts and local officials to protect and defend these fundamental liberties for Americans of all religions.

INTRODUCTION AND SUMMARY OF ARGUMENT

A vibrant Establishment Clause allows religious liberty and free exercise to flourish; it protects members of majority and minority faiths alike. The Establishment Clause is a co-guarantor of religious liberty, not an enemy to it. *See, e.g., Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 256 (1963) (Brennan, J., concurring). While there is an inherent tension between the Establishment Clause and the Free Exercise Clause, *see Thomas v. Review Bd.*, 450 U.S. 707, 719-20 (1981), it is wrong to conclude that one right should prevail over the other. Rather, it is the appropriate balance between the religion clauses that protects the religious liberties of each of us. *See, e.g., Sherbert v. Verner*, 374 U.S. 398, 409-10 (1963) (extending unemployment benefits to Sabbatarians protects the free exercise of religion but does not promote the establishment of those protected beliefs). Ultimately governments, including state governments, must have some

discretion in striking the proper balance.

In our poly-theistic society – one that is increasing in diversity with each passing day – the Establishment Clause has a unique role in protecting minority religions. This Court has long recognized that perceived government endorsement of majority religious beliefs, even if indirect, puts subtle but very real pressure on members of religious minorities. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring); *see also Sch. Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373, 385 (1985) (government aid to pervasively sectarian institutions creates a "symbolic link between government and religion, thereby enlisting . . . the powers of government to the support of the religious denomination . . . ."), *overruled on other grounds by Agostini v. Felton*, 521 U.S. 203 (1997). Majority religions by their nature dominate the landscape. As a result, laws or policies that appear facially neutral may actually redound to the benefit of majority religions to the exclusion of religious minorities. Governments must have the latitude to protect against religious inequality and make ensure democratic protections for members of minority religions.

Here, the State of Washington protects the religious exercise rights of all its citizens by providing greater anti-establishment protections than does the United States Constitution. To that end, Washington declined to fund Davey's training as a minister of his faith. In doing so, Washington did not infringe Davey's Free Exercise rights. Davey is free to pursue his religious calling at the school of his choice, albeit at perhaps a greater expense than if he had received state funding. If Davey succeeds in forcing the state to fund his study of theology, all state denials of religious funding will be subject to Free Exercise challenges. As a result, states could be required to fund a

broad range of religious activity under circumstances that may threaten Establishment Clause goals. At risk is a tipping of the balance between the religion clauses – with Free Exercise being given unprecedented importance at the expense of Establishment Clause principles.

States must be given latitude to protect Establishment Clause values to the same extent they are given room to protect Free Exercise rights. There is sufficient "play in the joints" between the religion clauses to allow for both accommodation of religion and religious equity through separation. A state's interest in preserving and protecting anti-establishment principles is an interest of the "highest order." Washington's state constitution seeks vigorously to avoid any perceived government endorsement of religion and supports the state's special interest in preserving the values of religious equity and non-entanglement for all of its citizens.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION IS UNSUPPORTED BY ANY REASONABLE READING OF THIS COURT'S PRECEDENTS.

This case is about whether Article 1, section 11 of the Washington State Constitution, and the state statutes and programs implementing its mandate, harm or suppress religion. The Ninth Circuit relies on a serious misreading of *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), and *McDaniel v. Paty*, 435 U.S. 618 (1978). The court ignores the relevant inquiry – suppression of religion – and instead frames the question as whether government has acted neutrally toward religion. Compounding this error, the court overlays onto the Free Exercise inquiry the viewpoint neutrality doctrine found in

Free Speech cases such as *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995). Because of these missteps, the Ninth Circuit reaches a conclusion that, if allowed to stand, would create a new, unrestrained Free Exercise Clause while simultaneously eviscerating the Establishment Clause.

A. This Court Has Never Held That the Free Exercise Clause Is Violated By Mere Differential Treatment of Religion.

Mere differential treatment of religious activity – if it does not impose a coercive burden on religious exercise – does not violate the Free Exercise Clause. The Ninth Circuit majority held otherwise, wholly relying on *Lukumi* and *McDaniel*. A parsing of each of those decisions, however, yields the conclusion that the court simply misread both.

The *Lukumi* opinion opens by articulating the bedrock principle of this Court's Free Exercise jurisprudence: "government may not enact laws that suppress religious belief or practice." *Lukumi*, 508 U.S. at 523. This rule "is so well understood that few violations are recorded in [the Court's] opinions." *Id.* At a minimum, this rule means that "the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Id.* at 532. Thus, the Free Exercise Clause concerns itself with whether the object of a law is "religious persecution," imposition of "special disabilities on the basis of . . . religious status," or to "infringe upon or restrict practices because of their religious motivation." *Id.* at 532-33.

These core principles were the concerns at issue in

Lukumi and *McDaniel*. The critical issue in *Lukumi* was whether the state had as its object the "suppression of the central element of the Santeria worship service." *Id.* at 534. The law invalidated in *Lukumi* did, as respondent argues, effectively single out religious activity for differential treatment. But what made the law unconstitutional was that it singled out religious activity by imposing an undeniably substantial burden on religious activity – in the form of a criminal prohibition on a core religious rite. *Lukumi*, 508 U.S. at 546-47. The ordinances in *Lukumi* "had as their object the suppression of religion." *Id.* at 541. Similarly, in *McDaniel*, the critical issue was whether the state was specifically "punishing a religious profession with the privation of a civil right." *McDaniel*, 435 U.S. at 626 (quoting 5 *Writings of James Madison* 288 (G. Hunt ed., 1904)).

Neither *Lukumi* nor *McDaniel* (or any other opinion of this Court) hold that the Free Exercise Clause requires government to be neutral as between religion and nonreligion.[3] As well-illustrated in *Lukumi*, neutrality in the Free Exercise context only arises as a tool to examine whether the purpose and effect of the subject law is to

[3] It is as if the Ninth Circuit has confused the different meanings of the word neutrality in this Court's Establishment and Free Exercise Clause jurisprudence. Establishment Clause neutrality is a weak notion of neutrality; it requires that states "not favor or endorse either religion generally over nonreligion or one religion over others." *Lee v. Weisman*, 505 U.S. 577, 627 (1992) (Souter, J., concurring). Free Exercise Clause neutrality, on the other hand, is much stronger; it prohibits selection, targeting and discrimination against religious practice. *Lukumi*, 508 U.S. at 562 (Souter, J., concurring). Thus, in *Zelman*, an Establishment Clause case, the petitioners claimed that lack of neutrality in the voucher program endorsed religion. *Zelman v. Simmons-Harris*, 536 U.S. 639, 648 (2002). Here, Davey must claim something much stronger and quite different: he must assert that lack of neutrality as between religion and nonreligion has harmed his ability to practice his religion.

suppress religion or restrict religious practice. *Lukumi*, 508 U.S. at 534. *McDaniel* is a unique case that touched not on neutrality (as the Ninth Circuit thought it did), but on concerns that the state constitution punished religious beliefs by depriving ministers of their right to engage in the political process. As such, the Ninth Circuit is wrong when it concludes that the offering of general government benefits that exclude religious use imposes the same kind of disability as those imposed in *Lukumi* and *McDaniel*. The differential treatment of religion does not automatically rise to the level of "a disability on the basis of religious status" within the ambit of the Free Exercise Clause. *Cf. Davey v. Locke*, 299 F.3d 748, 752 (9th Cir. 2002). Simply and clearly, *McDaniel* and *Lukumi* show that lack of neutrality does not *ipso facto* translate into a Free Exercise violation.

B. Davey Has Not Suffered Any Harm Under the Free Exercise Clause.

In light of this Court's Free Exercise standard, no reasonable reading of the facts here show that Davey was harmed by the state's policies. It is beyond dispute that Davey suffered no harm remotely similar to the harms wrought in *Lukumi* and *McDaniel* by the state. The state's denial of tuition assistance neither burdens Davey's religious activity nor suppresses religious expression. Davey is free to pursue his calling as a minister of his faith. Unlike the Church of Lukumi Babalu Aye, Davey's religious practice has not been outlawed by the state; he can attend the school of his choice and study for the ministry. Unlike Minister Paul McDaniel, Davey is not forced to choose between a fundamental civil right and his religious worship.

Davey remains unequivocally entitled to "the right to

preach, proselyte, and perform other similar religious functions, or, in other words, to be a minister of the type" he wants to be. *McDaniel*, 435 U.S. at 626; *see also Davey*, 299 F.3d at 762 (McKeown, J., dissenting) ("Neither Davey nor the majority seriously contends that either [provision] was intended to suppress religion. And, because Davey was still able to pursue his chosen major in the absence of funding, he would be hard-pressed to argue that either of these provisions has the unintended effect of suppressing his religious exercise."). Davey's right to study, learn and practice his religion are entirely unaffected.

In sum, it is very telling that regardless of how this Court rules in this matter, Davey is able – fully and freely – to practice his religion openly and unencumbered by the law. The same could not have been said for McDaniel or the Church of Lukumi Babalu Aye.

C. The Ninth Circuit Would Have This Court Remove All Limits on the Free Exercise Clause.

1. The Free Exercise Clause Does Not Require the Government to Fund Religious Exercise.

This Court has never interpreted the Free Exercise Clause as a source for claims for government benefits, monetary or otherwise. "[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government." *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring). More broadly, there is simply no precedent mandating that states fund the exercise of fundamental rights, much less the exercise of religious practices.

Indeed, this Court has held that there is no right to

government funding of the political process or for a woman to exercise her right to abortion. *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977); *Buckley v. Valeo*, 424 U.S. 1, 96 (1976); *see also Davey*, 299 F.3d at 764 (discussing that Davey has the constitutional right to become a minister, but he does not have the right to government funding of that pursuit) (McKeown, J., dissenting). Funding is not required even if the lack of funding puts some restrictions on the actual exercise of that right.

This principle is especially well-grounded in the jurisprudence of the Free Exercise Clause. The Court has never held that the Free Exercise Clause is implicated by a simple failure to facilitate religious exercise, whether by funding or through some other form of assistance. *See, e.g., Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 391 (1990) (holding that a tax decreasing the amount of money available for religious activities does not put a substantial burden on religious worship for purposes of the Free Exercise Clause); *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989) (holding that there was no Free Exercise violation where tax code effectively made religious practice more expensive); *Bob Jones Univ. v. United States*, 461 U.S. 574, 603-04 (1983) (holding that denial of tax benefits to religious schools that discriminate does put a financial burden on those schools but does not violate the Free Exercise Clause). Nor has the Court held that Here, Davey is free to pursue his calling as a minister of his faith. Thus, any differential treatment in funding does not result in a Free Exercise violation.

2. The Limited Public Forum Doctrine Has No Applicability Here.

Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1995), does not compel funding of Davey's education as a minister. *Rosenberger* was decided on free speech grounds, and stands only for the proposition that states may not discriminate against religious speech in a limited public forum. *Id.* The *Davey* majority attempts to expand *Rosenberger* beyond its limits by denominating the Promise Scholarship as a fiscal forum subject to the viewpoint discrimination rules of free speech cases. *See Davey*, 299 F.3d at 755-56. The *Davey* rationale, if accepted, would raise serious questions about the nature of limited public forums. For example: Do governments create a fiscal forum whenever they institute a spending program? Is a state budget a fiscal forum? Is a school district budget a fiscal forum? *But cf. Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 586 (1998) (holding that NEA grant program is not a limited public "forum" triggering free speech rights for grant applicants). As a practical matter, this extension of the limited public forum doctrine would open countless state funding decisions to legal challenge.

As legal precedent, *Rosenberger* has little value here. This Court has recently explained that the limited public forum doctrine only applies when the purpose of a government program is to promote private speech. *United States v. Am. Library Ass'n, Inc.*, 123 S. Ct. 2297, 2309 n.7 (2003) (plurality opinion) (holding that library internet terminals are not a public forum).[4] Here, the purpose of the

[4] Justice Breyer agreed in his concurrence that the public forum doctrine was inapplicable to the case. *Am. Library Ass'n*, 123 S. Ct. at 2310 (Breyer, J., concurring).

Promise Scholarship is to facilitate college attendance and strengthen the state's economy, not to encourage private speech. The scholarship program does not create a limited public forum and therefore raises no issue of viewpoint discrimination. *Id.*[5]

D. If This Court Accepts Davey's Position, States Will Be Flooded With Litigation, Endangering the Heart of the Nation's Social Services System.

Under the Ninth Circuit's rationale, any state funded program may create a limited public forum for competing viewpoints and states would be required to allow religious organizations to participate. The problem is likely to be especially pronounced in the context of social-service providers. As this Court is undoubtedly aware, there is an active and unresolved debate over government funding of pervasively sectarian organizations for the delivery of social services.[6] The "charitable choice" movement, as it is commonly known, would allow pervasively sectarian groups to compete for government contracts on equal footing with other providers. Under the 1996 Welfare

[5] *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), is inapposite here for the same reason. "*Velazquez* held only that viewpoint-based restrictions are improper 'when the [government] does not itself speak or subsidize transmittal of a message it favors *but instead expends funds to encourage a diversity of views from private speakers.*'" *Am. Library Ass'n*, 123 S. Ct. at 2309 n.7 (quoting *Velazquez*, 531 U.S. at 542) (emphasis in original).

[6] On April 11, 2003, the Senate passed S. 476 also known as the CARE Act of 2003. The CARE Act expands tax incentives for individuals to support both religious and nonreligious charities without voiding charities' obligations under existing civil rights law. Some of the most controversial provisions of the bill were excised before passage, such as allowing faith-based organizations that discriminate in hiring on the basis of religion to receive federal funds.

Reform Statute, states have the discretion to contract with faith-based organizations to provide social services, but are not required to do so. *See* 42 U.S.C. § 604a *et seq.* *Amici* oppose "charitable choice" because it requires people of all faiths to fund organizations with which they may have serious disagreement. *See Mitchell v. Helms*, 530 U.S. 793, 840 (2000) (O'Connor, J., concurring). And the dominance of majority religious groups indicates that it will be functionally impossible for governments to administer "charitable choice" programs without violating both the Establishment Clause and the Free Exercise Clause.[7]

In addition to the Constitutional concerns, the Ninth Circuit's fiscal forum rationale may lead to legal challenges to each and every funding decision a state makes. Beneficiaries of state social services may try to insist that their Free Exercise rights are violated if they do not receive services from religious providers of their choice. *See, e.g.*, *Freedom from Religion Found., Inc. v. McCallum*, 179 F. Supp. 2d 950, 965-66 (W.D. Wis.) (drug rehabilitation program has third-party standing to raise free exercise claims of its participants), *on reconsideration in part*, 214 F. Supp. 2d 905 (W.D. Wis. 2002), *aff'd*, 324 F.3d 880 (7th

[7] The controversy over "charitable choice" programs is no chimera. It is real. The Pew Research Center for the People and the Press reported in a 2001 survey that Americans expressed general enthusiasm for the idea of faith-based groups receiving funds from the government to provide social services. The Pew Research Center for the People and the Press: *Faith Based Funding Backed, But Church-State Doubts Abound*, 1 (Apr. 10, 2001), *at* http:people-press.org/reports. But that general enthusiasm did not extend to all religious groups equally. Forty-six percent of those surveyed opposed Muslim or Buddhist groups receiving government funding. *Id.* Forty-one percent of people in the study also opposed the participation of the Mormon church in government aid programs. *Id.* The survey showed a clear bias for Judeo-Christian groups as providers, with substantial doubt as to whether non-Judeo-Christian organizations should be allowed to compete for government funds at all. *Id.* at 12-13.

Cir. 2003). Moreover, religious organizations will demand equal access to payment of state funds.

The legal morass would only compound the severe budget crises that many states are facing. State governments, faced with limited resources, will be forced to choose among applications from various religious organizations, funding some at the expense of others. The courts will be forced to demarcate the boundaries of *Davey*'s new fiscal forum doctrine, deciding how states must allocate and structure their limited resources for social services. *Cf. San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40-41 (1973) (providing that courts should defer to states' discretion in allocating their own funds).

Moreover, states seeking to preserve the Establishment Clause values of non-entanglement and non-endorsement will be caught in an untenable situation, squeezed between competing mandates. Many states may have no choice but to shut down their so-called "fora" entirely, to avoid litigation over the distribution of funds. This supposition is hardly hypothetical. When faced with the Supreme Court's jurisprudence on access to schools for religious groups and the prohibitions of the state constitution, Washington educators began to ask this very question: "are school districts required to deny all access to school facilities for non-curricular student groups in order to comply with both state and federal law?" Wash. Op. Att'y Gen. No. 3, (Mar. 23, 1995) *at* 1995 WL 152854. And while the consequences of denying after-school access to student groups may be acceptable, the consequences of state withdrawal from the provision of social services to the needy are not. *Davey's* holding that a discretionary state funding program creates a limited public forum could have severe consequences for state governments and their most at-risk constituents.

II. THE NINTH CIRCUIT'S DECISION UNDERMINES THE BALANCE BETWEEN THE FREE EXERCISE AND ESTABLISHMENT CLAUSES.

Because Davey has no right to funding of his religious activities, *Amici* do not believe that Washington has burdened his Free Exercise rights. But even if it had, the imposition of that burden would be justified by Washington's interest in vindicating the religious equality and non-entanglement values protected by the Establishment Clause.

A. This Court's Precedents Give Governments Discretion to Protect Free Exercise Values Without Violating the Establishment Clause.

A state's failure to accommodate religious exercise rarely rises to the level of a Free Exercise Clause violation. *See Employment Div. v. Smith,* 494 U.S. 872, 881 (1990). But as this Court has long recognized, that does not mean that the states are precluded by the Establishment Clause from making special efforts to protect religious activity and Free Exercise Clause values. *See Walz v. Tax Comm'n,* 397 U.S. 664, 673 (1970) ("The limits of permissible state accommodation to religion are by no means coextensive with the noninterference mandated by the Free Exercise Clause."); *see also Smith*, 494 U.S. at 890 ("[T]o say that a nondiscriminatory religious-practice exemption is permitted, or even desirable, is not to say that it is constitutionally required. . . ."). In other words, even when the Free Exercise Clause would not otherwise be violated, a state may, at its discretion, act to maximally and robustly protect Free Exercise values.

In practice, this rule means that governments may exempt religious organizations and entities from generally applicable burdens and legal requirements, even if they are not required to do so by the Free Exercise Clause. *See Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (upholding broad Title VII exemption for religious organizations); *Walz,* 397 U.S. at 680 (upholding tax exemption for religious organizations). Under other circumstances, singling out religious organizations for favorable treatment would appear to violate the Establishment Clause. But when the government acts in an effort to protect Free Exercise values, the Court has held that the Establishment Clause should not stand in the way. *Amos,* 483 U.S. at 339. This result occurs because there is some space between the competing mandates of the twin religion clauses – "a play in the joints." *Walz,* 397 U.S. at 669. It is this space that permits discretionary government action to robustly protect religious rights.

B. Governments Also Must Have Discretion to Protect Establishment Clause Values Without Violating the Free Exercise Clause.

A state's interest in adhering to a strong separation of church and state is undeniably of the "highest order." Indeed, this Court has recognized already that the government may have a "compelling interest" in upholding the Establishment Clause. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001). That interest extends to promoting and protecting the values underlying the Establishment Clause.

Even if extending funding to theology degrees would not amount to a violation of the Establishment Clause, Washington should have the discretion permissively to promote and protect Establishment Clause values.

Protecting against religious inequality and harmful state entanglement with religious institutions is at least as important a state interest as those deemed "compelling" under this Court's Free Exercise jurisprudence. For instance, the Court has denied Free Exercise claims on the ground that states have compelling interests in maintaining the social security system, protection of children, and raising of armies. *See e.g., United States v. Lee*, 455 U.S. 252 (1982) (social security system); *Gillette v. United States*, 401 U.S. 437 (1971) (selective service); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (distribution of pamphlets by children). In each of these cases, the state's interest, based in statutory law or societal values, was sufficient to override an individual's Free Exercise rights. There is no reason why the state's interest in protecting core constitutional values, as reflected in the Establishment Clause, should be given less stature.

If the Constitution gives states discretion to robustly protect Free Exercise values – even when those actions would otherwise violate the Establishment Clause – there is no reason to deprive states of a comparable zone of discretion to protect Establishment Clause values. States are often forced to make policy decisions that lie at the intersection of the Free Exercise and Establishment Clauses: they are required to "chart a course that preserve[s] autonomy and freedom of religious bodies while avoiding any semblance of establishment." *Wisconsin v. Yoder,* 406 U.S. 205, 221 (1972) (quoting *Walz v. Tax Comm'r*, 397 U.S. 664, 672 (1970)). States have been given increasing flexibility to experiment in matters of religion. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). States need precisely the same latitude when they act to protect Establishment Clause values. *See Widmar v. Vincent*, 454 U.S. 263, 282 (1981) (White, J., dissenting). ("[J]ust as there is room under the

Religion Clauses for state policies that may have some beneficial effect on religion, there is also room for state policies that may incidentally burden religion."). The *Davey* dissent puts it best:

> [F]ederalism concerns should [not] represent a one-way street when it comes time for a state to decide whether to enter into the ill-defined terrain of the Establishment Clause's jurisprudence.
>
> . . . [T]he State of Washington's decision not to "experiment" in the funding of religious indoctrination should represent an equally valid concern – both as a matter of federalism and with respect to the more explicit limitations of the Religion Clauses.

Davey, 299 F.3d at 768 (McKeown, J., dissenting).

C. Washington Has a Special Interest In Preserving the Force of Its State Constitution Establishment Clause.

Washington's policy choice to provide greater anti-establishment protections than the United States Constitution is codified in its state constitution. Article I, § 11 of the Washington Constitution provides:

> Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify

> practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment . . . .

This provision was "created to protect religious freedom, not to prevent it." *Gallwey v. Grimm*, 48 P.3d 274, 295 (Wash. 2002) (Johnson, J., concurring). Washington's long-standing choice not to provide state funding for the training of ministers was not born out of religious hostility, but rather from the desire to provide the greatest amount of religious freedom for all of its citizens. *Gallwey*, 48 P.3d at 286 (quoting *Perry v. Sch. Dist. No. 81*, 344 P.2d 1036 (Wash. 1959)) ("It was never the intention that our constitution should be construed in any manner indicating any hostility toward religion."); Wash. Op. Att'y Gen. No. 3, (Mar. 23, 1995), *at* 1995 WL 152854 ("The purpose of article 1, section 11 was not to denigrate, repudiate, or isolate religion, such as by confining religious practices exclusively to private property, but to protect and enhance religious liberty, by assuring that every citizen could follow his or her own faith without fear of government entanglement"). As the *Davey* dissent so aptly pointed out, "Washington's decision not to fund religious education simply reflects its strong desire, as reflected in its constitution since ratification in 1889, to insulate itself from the appearance of endorsing religion." *Davey*, 299 F.3d at 762 (McKeown, J., dissenting).

Washington's concerns are completely consistent with the Free Exercise Clause, even assuming that one individual's exercise rights may be diminished. Because no public funds are to be appropriated for "religious worship, exercise or instruction," Washington taxpayers are

not "put in the position of paying for the religious instruction of aspirants to the clergy with whose religious views they may disagree." *Witters v. State Comm'n for the Blind*, 771 P.2d 1119, 1120 (Wash. 1989). Thus, this case is not necessarily a conflict between the federal Free Exercise rights of one individual and a state establishment clause. Rather, this case is at the intersection of free exercise rights of one individual and the overall free exercise rights of the people of an entire state, as evidenced by their chosen state constitution. The Washington constitution embodies the special interest that the state has in preserving Establishment Clause values – to protect religious minorities, to avoid any perception of entanglement, and to protect the Free Exercise rights of each and every one of its citizens by erecting a more stringent wall between church and state.[8]

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[8] Contrary to Justice Thomas' concurrence in *Zelman*, the Establishment Clause as well as the Free Exercise Clause "protect[] individual liberties of religious worship." It is undisputedly settled that the 14th Amendment incorporated the Establishment Clause against the states and it is also well established that the liberties protected by the Establishment Clause are the exact same liberties that the 14th Amendment was meant to protect. *See Wallace v. Jaffree*, 472 U.S. 38 (1985); *Engel v. Vitale*, 370 U.S. 421 (1962); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); *Cantwell v. Connecticut*, 310 U.S. 296 (1940). This is consistent with Madison's interpretation of how the wall between church and state served to protect free exercise liberties, and is even more relevant today, in our poly-theistic society. *See generally*, *Zelman*, 536 U.S. at 717 (Breyer, J., dissenting). But, if Justice Thomas' argument were to be taken at its face value – that the federal Establishment Clause does not apply to the states (an argument that *Amici* strongly disagree with) – the inevitable result must be that states would have the ability to fashion their own establishment clauses in response to citizen concerns and that the limits of the federal Establishment Clause cannot constitute the *de facto* limits of state establishment clauses.

This Court should accord special deference to state interests that, like Washington's interest in protecting Establishment Clause principles, are codified in state constitutions. Of course, a state interest does not automatically become "compelling" for federal constitutional law purposes simply because it is included in a state constitution. But when a state like Washington so highly values a particular interest that it is prepared to elevate it to constitutional status, this Court should be especially reluctant to second-guess the state's judgment. And that principle should apply with special force in this context. Washington's defense of its practices is not opportunistic or arbitrary. Rather, it reflects the state's long-standing commitment to Establishment Clause values codified in its constitution.

D. The Interests at Stake Here Are Not Limited to the State of Washington.

A decision here will necessarily affect the laws, regulations and policies of a large number of states, beyond Washington, that have similar constitutional provisions. In fact, a majority of states have constitutional provisions similar to the one at issue here, which restrict state funding of religious education.[9] These provisions are commonly

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[9] Scholars place the number of these "Blaine Amendments" in state constitutions between twenty-nine and thirty-three. *See* Note, *School Choice and State Constitutions*, 86 Va. L. Rev. 117, 123 n.32 (Feb. 2000) (compiling research of five legal scholars and concluding that there are approximately thirty Blaine Amendments in state constitutions). A "relatively expansive list" of state constitutional amendments representing Blaine Amendments encompasses the following state constitutional provisions: Alaska Const. art. VII, 1; Ariz. Const. art. II, 12; Cal. Const. art. IX, 8; Colo. Const. art. V, 34, art. IX, 7; Del. Const. art. X, 3; Fla. Const. art. I, 3; Ga. Const. art 1, 2, P VII; Haw. Const. art. X, 1; Idaho Const. art. IX, 5; Ill. Const. art. X, 3; Ind. Const. art. I, 6; Ky. Const. 189; Mass. Const. art. XVIII; Mich.

referred to as Blaine Amendments – their name originates from Senator James Blaine's attempt to obtain passage of similar federal language in 1875. Robert F. Utter & Edward J. Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 Hastings Const. L. Q. 451, 468-78 (1988). And like Washington, many states interpret their Blaine Amendments as providing greater protections to their citizens than the federal establishment Clause.[10] A number of states hold that activities that would not violate the federal Establishment Clause – such as loaning textbooks to religious schools, providing transportation to religious schools and indirect funding of religious education – are nevertheless prohibited by the anti-establishment provisions of their state constitutions. *See, e.g., Elbe v. Yankton Indep. Sch. Dist.*, 640 F. Supp. 1234, 1237 (D.S.D. 1986) ("Recognizing the policy of comity, this court accepts the determination of the South Dakota Supreme Court and holds that the textbook loan statutes are in fact unconstitutional on their face, under Article VI, Section 3, and Article VIII, Section 16, of the South Dakota Constitution."); *Witters v. State Comm'n for the Blind*, 771

Const. art. VIII, 2; Minn. Const. art. I, 16, art. XIII, 2; Mo. Const. art. IX, 8; Mont. Const. art. X, 6; Neb. Const. art. VII, 11; N.H. Const. pt. II, art. 83; N.M. Const. art. XII, 3; N.Y. Const. art. XI, 3; N.D. Const. art. VIII, 5; Okla. Const. art. II, 5; Or. Const. art. I, 5; Pa. Const. art. III, 29; S.C. Const. art. XI, 4; S.D. Const. art. VI, 3; Tex. Const. art. I, 7; Utah Const. art. I, 4, art. X, 9; Wash. Const. art. I, 11; Wis. Const. art. I, 18; Wyo. Const. art. I, 19. *Id.* (list includes thirty-two states).

[10] Among states with Blaine Amendments, twelve have indicated that they have a stricter standard of separation than the First Amendment of the federal constitution. *See* Joseph P. Viteritti, *Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 681 n.110 (1998). These states are Alaska, California, Delaware, Hawaii, Idaho, Michigan, Minnesota; Missouri, Nebraska, South Dakota, Virginia, and Washington. *Id.*

P.2d 1119 (Wash. 1989) (holding that extension of tuition assistance to theology students was prohibited by Washington state constitution); *Cal. Teachers Ass'n v. Riles*, 632 P.2d 953, 964 (Cal. 1981) (holding that textbook loan statute was unconstitutional under Art. IX, § 8 and Art. XVI, § 5 of the California Constitution because those provisions "do not confine their prohibition against financing sectarian schools in whole or in part to support for their religious teaching function, as distinguished from secular instruction"); *Epeldi v. Engelking*, 488 P.2d 860, 866-67 (Idaho 1971) (concluding that framers of Idaho constitution "intended to more positively enunciate the separation between church and state than did the framers of the United States Constitution," and "a state has sufficient latitude under the Fourteenth and First Amendments to uphold its policy against aid to religion although by doing so free exercise of religion (attending parochial schools) becomes more expensive.").

While these amendments are often criticized as being the product of anti-Catholic animus, neither Davey nor the Ninth Circuit contended that the Washington constitutional provision at issue was enacted to suppress religion. *Davey*, 299 F.3d at 762 (McKeown, J., dissenting). Indeed, the actual legislative history of Washington's Blaine Amendment shows that the state saw it as a way to protect the Free Exercise rights of all of its citizens.[11] *See Gallwey v. Grimm*, 48 P.3d 274, 295 (Wash. 2002) (Johnson, J., concurring); Robert F. Utter & Edward J. Larson, *supra* at

[11] James Blaine, himself, said that the federal proposal, which ultimately formed the basis for the state Blaine Amendments, was meant to be "fair alike to Protestant and Catholic, to Jew and Gentile, leaving the religious faith and conscience of every man free and unmolested." Robert F. Utter & Edward J. Larson, *supra* at 473 n.110 (quoting C. Balestier, *James G. Blaine: A Sketch of His Life* 59 (1884)).

468-78 (noting that state constitutional delegates recognized the importance of religion in general to society, but sought to avoid government support of sectarianism).

Despite the vigorous debate over the historical record, there are legal reasons to refuse to consider the origin of these amendments. Any initial animus in the amendments has been purged by years of Washington's reaffirmation to the principles of separation of church and state. For example, the provision before the Court – Article I, § 11 of the Washington Constitution – was amended in 1903, 1957 and 1993. *See, e.g.*, Amendment 88, 1993 H.R. J. Res. 4200, p. 3062 (Approved November 2, 1993). The 1903 amendment directly added to the clause in question a proviso relating to the state's employment of chaplains: "Provided, however, that this article shall not be so construed as to forbid the employment by the state of a chaplain for the state penitentiary, or for such of the state reformatories as in the discretion of the legislature may seem justified." Having been thus reconsidered and reauthorized, the Amendment is purged of whatever taints may have existed in the 1880s.

Moreover, the mere fact that a law originally may have had a discriminatory purpose should not be permitted to abrogate the neutral role that those laws have come to play in our poly-theistic society. *Cf. McGowan v. Maryland*, 366 U.S. 420, 445 (1961) ("The present purpose and effect of most [Sunday closing laws] is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than

one of mere separation of church and State."). As the diversity of religious belief and practice has grown in this country, so too has the important protections that the Blaine Amendments offer. The Blaine Amendments provide states with critical tools to protect Establishment Clause values.

CONCLUSION

Amici respectfully submit that the decision of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, *et al.*,
Petitioners,

v.

JOSHUA DAVEY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF SOLIDARITY CENTER FOR LAW AND JUSTICE, P.C. IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE* [1]

Solidarity Center for Law and Justice, P.C. is a professional corporation organized under the laws of the State of Georgia for the promotion of social welfare by defending human and civil rights secured by law, to wit: those individual liberties, freedoms, and privileges involving human dignity that are either specifically guaranteed by the U. S. Constitution or by a special statutory provision coming directly within the scope of the 13th or 14th Amendment, some other comparable constitutional provision, or that otherwise fall within the protection of the Constitution by reason of their long established recognition at the common law as rights that are essential to the orderly pursuit of happiness by free men and women. When permitted by court rules and practice, Solidarity Center for Law and Justice, P.C. files briefs as *amicus curiae* in litigation of importance to the protection of human and civil rights, particularly when the primary right of parents to direct the upbringing of their children in accordance with the dictates of their consciences is at issue.

Many theology majors at postsecondary educational institutions in the State of Washington are future religious leaders who will provide counseling, educational, and social services to Washington citizens. By depriving certain theology majors equal access to publicly-funded Promise Scholarships, the State of Washington abridges the classroom discourse through which these aspiring religious leaders gain important insights regarding the present condition of, and means for improving, individual lives and society. Yet, there is no

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[1] All Petitioners and Respondent have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court pursuant to Rule 36. Counsel for the *amicus curiae* authored the brief in its entirety. No person or entity, other than the *amicus curiae* and its counsel, made a monetary contribution to the preparation or submission of the brief.

evidence that theology majors, their professors, or their mentors in faith-based counseling, educational, and social service organizations are engaging in constitutionally proscribable speech or conduct that poses a threat to democratic institutions. This Court should affirm the decision of the United States Court of Appeals for the Ninth Circuit that it is unconstitutional to deny a Promise scholarship to an otherwise qualified student because the student decides to pursue a theology degree from a religious perspective.

SUMMARY OF ARGUMENT

Democratic evolution, the advancement of human society through deliberative discourse among citizens holding competing visions of the common good and the means of its promotion, depends on freedom of thought. "The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, ___, 122 S.Ct. 1389, 1403 (2002).

The thoughts to which America's college and university students are exposed determine the course of our democracy. This Court "[has] repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society." *Grutter v. Bollinger*, ___ U.S. ___, 123 S.Ct. 2325, 2340 (2003) (quoting *Plyler v. Doe*, 457 U.S. 202, 221 (1982)).

For this reason, in a pluralist democratic society, it is essential that postsecondary educational institutions be open to competing viewpoints of the best means for maintaining the fabric of society. "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence

in the openness and integrity of the educational institutions that provide this training." *Grutter*, 123 S.Ct., at 2341. It is no less the case that, absent conduct that presents a threat to the well-being of a democratic society, the path to leadership must be visibly open to talented and qualified individuals of every *religion*.

Because of nineteenth century political, philosophical, and professional fears relating to the effect of Roman Catholic immigrants on the fabric of American society, the State of Washington, together with many other states, enacted broad prohibitions "aimed at the suppression of ideas thought inimical to the Government's own interest." *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 549 (citing *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 548 (1983); *Speiser v. Randall*, 357 U.S. 513, 519 (1958)).[2] These so-called Blaine Amendments[3] were relied upon to

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[2] Wash. Const. art. I, § 11, adopted in 1889, provides in pertinent part that: "No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or the support of any religious establishment."

[3] In December 1875, a Republican member of the House of Representatives and Presidential hopeful, James G. Blaine, introduced the following proposed constitutional amendment:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations. 4 Cong. Rec. 205, 44th Cong. (1st Sess. 1875).

The bill was defeated in its final form; however, the objective was partially attained with regard to the later states (including Washington) admitted into the Union through enabling acts which required them to adopt ordinances guaranteeing the establishment of public schools "free from sectarian control." See Jorgenson, *The State and the Non-Public*

manipulate government funding in a manner that "resulted in the imposition of a disproportionate burden calculated to drive 'certain ideas or viewpoints from the marketplace.'" *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) (quoting *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)).

By relying on its Blaine Amendment to deny Promise scholarships to certain theology majors, the State of Washington abridges private teacher-student discourse on the maintenance of the fabric of society from a religious perspective. Such abridgement distorts the postsecondary educational medium of expression by altering the traditional role of teachers and students "in much the same way broadcast systems or student publication networks were changed in the limited forum cases" decided by this Court. *Velazquez*, 531 U.S., at 544.

In many instances, students who graduate with theology degrees provide faith-based counseling, educational, and social welfare services that are not logically "different in kind" from the services offered by Promise scholarship students who graduate with degrees in social work, education, or psychology. *Good News Club v. Milford Central School*, 533 U.S. 98, 111 (2001). Nevertheless, students who enroll in theology degree programs that approach these vocations from a purely religious viewpoint are denied Promise scholarships.

By denying Promise scholarships to certain theology majors, the State of Washington uses a viewpoint-based restriction to regulate private expression between teachers and students in a manner that is aimed at suppressing the interchange of ideas for bringing about political and social changes thought inimical to the State of Washington's own

School, 1825-1925, 138-139 (1987); Gabel, *Public Funds for Church and Private Schools*, 524-525 (1937).

interests. In the absence of evidence that theology degree candidates and their professors are engaging in constitutionally proscribable speech, such regulation of private expression violates the First Amendment to the United States Constitution.

ARGUMENT

I. BY DENYING PROMISE SCHOLARSHIPS TO THEOLOGY MAJORS, THE STATE OF WASHINGTON USES A VIEWPOINT-BASED RESTRICTION TO REGULATE PRIVATE EXPRESSION IN A MANNER THAT IS AIMED AT SUPPRESSING THE INTERCHANGE OF IDEAS THOUGHT INIMICAL TO THE GOVERNMENT'S OWN INTERESTS.

The State of Washington denies Promise scholarships to theology majors who choose to engage in classroom discourse with their professors regarding how to maintain the fabric of society through faith-based counseling, educational, and social welfare services.[4] To deny public aid to students "who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech." *Speiser*, 357 U.S., at 518. By imposing such a penalty on theology majors, the State of Washington regulates private expression in a manner that is aimed at suppressing the interchange of ideas for bringing about political and social changes thought inimical to the State of Washington's own interests in maximizing the material wealth of its citizens and the growth of its economy.

[4] A declared major in theology disqualifies a student from receipt of a Promise Scholarship *only* when the subject is taught from a perspective that is "devotional in nature or designed to induce religious faith." Brief for Petitioners, 6.

A. The Promise Scholarship Program is Designed to Facilitate Private Speech, Not to Promote a Governmental Message.

Within broad limits, "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust v. Sullivan*, 500 U.S. 173, 194 (1991). In *Rust*, Congress had appropriated federal funding for family planning services and forbidden the use of such funds in programs that provided abortion counseling. *Id.*, at 178. Recipients of these funds challenged this restriction, arguing that it impermissibly conditioned the receipt of a benefit on the relinquishment of their constitutional right to engage in abortion counseling. *Id.*, at 196. This Court rejected that claim, recognizing that "the Government [was] not denying a benefit to anyone, but [was] instead simply insisting that public funds be spent for the purposes for which they were authorized." *Ibid.* See also *United States v. American Library Association, Inc.*, ___, U.S. ___, 123 S.Ct. 2297 (2003).

Relying on its analysis in *Rust*, in *American Library Association*, this Court rejected a challenge to a restriction on the government funding of Internet access in public libraries. This Court held that "Congress may certainly insist that these 'public funds be spent for the purposes for which they were authorized,'" which excluded pornographic material. *American Library Association*, 123 S.Ct., at 2308 (quoting *Rust*, 500 U.S., at 196).

The restrictions on government subsidy programs permitted under *Rust* and *American Library Association* may not be proper with respect to government subsidy programs that are "designed to facilitate private speech, not to promote a governmental message." *Velazquez*, 531 U.S., at 542. This Court has articulated two features of a government subsidy program that indicate the facilitation of private speech: i) the government-funded speaker serves as an independent advisor

or advocate for the ultimate beneficiary of the government subsidy, and ii) "the Government seeks to use an existing medium of expression and to control it, in a class of cases, in ways which distort its usual functioning." *Id.*, at 543. These two features exist in the present case.

B. A Teacher at a Postsecondary Educational Institution Serves as an Independent Advisor and Advocate for Students With Whom the Teacher Engages in Educational Discourse.

The academic freedom enjoyed by teachers at postsecondary educational institutions is critical to maintaining the fabric of American society. "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

it is this academic freedom that enables teachers and students to freely engage in private speech regarding the present social, economic, or legal order of society; to question or criticize the wisdom of the decision-making machinery of government and its leaders; to exchange theories for improving the material and spiritual conditions of society; and to advocate for political and social change.

The subject matters of private classroom discourse between teachers and their student theology majors may include: the ethical duties of business owners and employees in a post-Enron world; the religious implications of globalization and the treatment of workers and the environment in third-world nations; or the spiritual and psychological effects on individuals who lose their jobs during an economic downturn.[5] In discussing all of these real-life scenarios, teachers may

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[5] *See* Elizabeth Bernstein & Peter Landers, "For the Clergy, Flock's Troubles Become Their Own," *The Wall Street Journal*, July, 31, 2003.

encourage their theology students to challenge the status quo in ways that government and business officials think are inimical to existing business practices and the economic well-being of society. To challenge the status quo, students must be encouraged to disassociate, at least hypothetically, from the status quo. "Those who use the power of the state always desire to preserve a certain given order of things. They therefore always try to persuade or compel their subjects to accept, as right and reasonable, certain solutions (hardly ever the best) of the outstanding problems of politics and economics." Aldous Huxley, *Ends and Means*, 218 (1937).

It is the potential for challenging the status quo through private expression that places postsecondary educational discourse within the same category of private expression subsidized by the government in the indigent legal services program examined in *Velazquez*. As noted by this Court: "In the specific context of §504(a)(16) suits for benefits, an LSC-funded attorney speaks on the behalf of the client against the government for welfare benefits. The lawyer is not the government's speaker. . . . The advice from the attorney to the client and the advocacy by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of the concept. In this vital respect this suit is distinguishable from *Rust*." *Velazquez*, 531 U.S., at 542-543.

In *American Library Association*, this Court affirmed the vital "advisor and advocate" distinction between private speakers as existed in *Velazquez* and the present case and government speakers as existed in *Rust*. It observed that, in the context of the publicly-funded legal assistance program in *Velazquez*, "the role of lawyers who represent clients in welfare disputes is to advocate *against* the Government, and there was thus an assumption that counsel would be free of state control." *American Library Association*, 123 S.Ct., at 2309 (citing *Velazquez*, 531 U.S., at 542-543). In contrast,

public libraries, "have no comparable role that pits them against the Government, and there is no comparable assumption that they must be free of any conditions that their benefactors might attach to the use of donated funds or other assistance." *Ibid.* (footnote omitted).

The government-subsidized speakers in *Rust* were the staff and volunteers of public or nonprofit private entities whose role under Title X of the Public Health Service Act was "to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of *acceptable* and *effective* family planning methods and services." 42 U.S.C. 300a. (emphasis added). Under federal regulations promulgated by the Secretary of Health and Human Services, the only "acceptable" and "effective" family planning methods and services which could be discussed with program clients would be those relating to preventive family planning services. *Rust*, 500 U.S., at 179.

While some State of Washington government and business leaders might prefer that college and university teachers engage in only "acceptable" and "effective" discourse in accordance with prescribed regulations, the benefits accruing to our democracy from the exercise of academic freedom dictate otherwise. "In our system [of public education], students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved." *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 511 (1969).

Likewise, postsecondary teacher-student classroom discourse does not fall within the same category as the government-regulated Internet speech at issue in *American Library Association*. According to this Court, a public library "provides Internet access, not to 'encourage a diversity of views from private speakers,' but for the same reasons it offers other library resources: to facilitate research, learning, and

recreational pursuits by furnishing materials of requisite and appropriate quality." *American Library Association*, 123 S.Ct., at 2299 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995)). Teachers at post-secondary educational institutions do not merely show up for class, pull out a stack of books for student perusal, and then sit silently for an hour while their students engage in self study.

Postsecondary teachers are advisors and advocates for their students; thus, private expression is critical to the educational relationship. Through the Promise Scholarship Program, the State of Washington does not fund mere *information*; it funds the *instigation* of economic, legal, and social thought, expression, and conduct. Through viewpoint-discriminatory *regulation*, the State of Washington distorts an education forum traditionally used for instigation into one used for *dictation*. In doing so, the State attempts to turn an Ivory Tower into a Tower of Babel, with students being rewarded for pursuing government-approved degrees that speak the one tongue of economic prosperity.

C. The State of Washington Seeks to Use the Postsecondary Educational Institution Medium of Expression and to Control It, Through Viewpoint Discrimination in the Case of Theology Majors, in a Way That Distorts Its Usual Functioning.

The purpose of the Promise Scholarship Program "is to help low and middle income students reap the economic benefits of a college education." Brief for Petitioners, 47. In achieving this purpose, the State of Washington denies Promise scholarships to students who use the medium of the State's postsecondary educational institutions to pursue a theology degree from a religious perspective. "Where the government uses or attempts to regulate a particular medium, we have been informed by its accepted usage in determining

whether a particular restriction on speech is necessary for the program's purposes and limitations." *Velazquez*, 531 U.S., at 543.

The accepted usage of the postsecondary classroom is as a center for the expression of competing viewpoints about "maintaining the fabric of society." *Grutter*, 123 S.Ct. at 2340. "The classroom is peculiarly the 'marketplace of ideas.' The Nations's future depends on leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (quoting *United States v. Associated Press*, 52 F.Supp. 362, 372 (1943)).

In the present case, the State of Washington seeks to improve the economic livelihood of its low and middle income citizens by subsidizing private teacher-student discourse at postsecondary educational institutions in the State. By penalizing the expression of religious viewpoints by theology majors, the State of Washington distorts the post-secondary educational medium of expression by handicapping the access of students to the traditional role that a teacher has as an advisor and advocate regarding possible changes in the political and social order. As the Promise Scholarship Program "involves a subsidy, limited forum cases such as *Perry*, *Lamb's Chapel*, and *Rosenberger* may not be controlling in a strict sense, yet they do provide some instruction." *Velazquez*, 531 U.S., at 544 (citing *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Rosenberger*, 515 U.S. 819).

In *Rosenberger*, this Court struck down a University of Virginia policy that authorized the payment of outside contractors for the printing costs of a variety of student publications but withheld any authorization for payments pertaining to a student paper that "primarily promotes or manifests a particular belie[f] in or about a deity or an

ultimate reality." *Rosenberger*, 515 U.S., at 825. This Court expressed two concerns regarding such viewpoint discrimination:

> The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and if so for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background of tradition of thought and experiment that is at the center of our intellectual and philosophical tradition.

Id., at 835. By awarding Promise scholarships to all qualifying low and middle income students except those who intend to base their postsecondary education on a purely religious ultimate idea, the State of Washington engages in viewpoint discrimination that is detrimental to democratic discourse. "For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the nation's intellectual life, its college and university campuses." *Ibid.*

This Court has expressed its disapproval over the regulation of speech that is designed to penalize viewpoints deemed "quintessentially religious" or "decidedly religious in nature" by government officials. See *Good News Club*, 533 U.S., at 111. In *Good News Club*, this Court held it to be an unconstitutional abridgement of free speech for a municipality, which had opened its public school classrooms to promote the moral and character development of children from a religious *perspective*, to deny such access to a Good News Club to do so in the form of religious *instruction* itself. This Court chose to "reaffirm our holdings in *Lamb's Chapel* and *Rosenberger* that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum

on the ground that the subject is discussed from a religious viewpoint." *Id.*, at 111-112.

Because the State of Washington is funding private teacher-student speech, not government speech, the viewpoint discrimination analysis of *Good News Club* is instructive. A Pastoral Ministries major at Northwest College (the college attended by Respondent) "is designed to prepare students for a career as a Christian minister." *Davey v. Locke*, 299 F.3d 748, 751 (9th Cir. 2002). In many cases, a Christian minister can be expected to be responsible, either directly or in a supervisory capacity, for youth counseling and character education, marriage counseling, lifeskills management counseling, effective parenting counseling, substance abuse counseling, and immigrant outreach and advocacy services.[6] Regardless of these important social functions that Pastoral Ministries majors may perform once they enter the workplace, the State of Washington denies them Promise scholarships because their education constitutes "religious instruction." Yet, Promise scholarships are awarded to students attending the School of Social Work at the University of Washington who, upon graduation, will perform many of these same functions.[7]

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[6] A recent study confirmed that:

> Churches and religious groups offer a vast array of services to their local communities, programs that sometimes are not being provided elsewhere. A few years ago, Catholic Charities in New York did a taxonomy of publicly-funded social services it provided through its network. After-school programs, refugee settlement, homeless shelters, food banks—they stopped counting at 197.

Joseph Laconte & Lia Fantuzzo, "Churches, Charity and Children: How Religious Organizations Are Reaching America's At-Risk Kids," p. 7 (2002).

[7] The following is the Mission Statement of the University of Washington School of Social Work:

> As members of the University of Washington School of Social Work, we commit ourselves to promoting social and economic

It is clear that the State of Washington is engaging in viewpoint discrimination with respect to the Promise Scholarship Program. Students who major in social work with the career goal of maintaining the fabric of society by counseling, educating, or otherwise serving individuals, families, and communities from a secular viewpoint receive Promise scholarships. Yet, students who major in theology (i.e. Pastoral Ministries) with the career goal of maintaining the fabric of society by providing the same kind of services from a religious viewpoint are denied Promise scholarships. There is "no logical difference in kind" between the invocation of Christianity by Christian ministers who provide or supervise faith-based counseling, education, and social services, and the invocation of principles of social and economic justice and human capacities for problem solving by secular counselors, educators and social workers to provide a foundation for their work. *Good News Club*, 533 U.S., at 111. This Court has never reached the conclusion

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justice for poor and oppressed populations and enhancing the quality of life for all. We strive to maximize human welfare through:

- Education of effective social work leaders, practitioners and educators who will challenge injustice and promote a more humane society, and whose actions will be guided by vision, compassion, knowledge and disciplined discovery, and deep respect for cultural diversity and human strengths;
- Research that engenders understanding of complex social problems, illuminates human capacities for problem-solving, and promotes effective and timely social intervention; and
- Public service that enhances the health, well-being, and empowerment of disadvantaged communities and populations at local, national, and international levels.

We embrace our position of leadership in the field of social work and join in partnership with others in society committed to solving human problems in the twenty-first century.

University of Washington School of Social Work, "The Mission Statement," http://depts.washington.edu/sswweb/mission.html (2003).

that "reliance on Christian principles taints moral and character instruction in a way that other foundations for thought or viewpoints do not." *Ibid.*

Government regulation of private thoughts and expression through viewpoint discrimination only can be sustained in the face of a compelling state interest, and, even then, the regulation must be narrowly tailored to achieve the state interest. Despite historical fears, embodied in Article I, § 11 of the Washington Constitution, that government-subsidized Catholic educational and social services would be inimical to maintaining the fabric of American society, the State of Washington's denial of Promise scholarships to students pursuing a degree in theology is an abridgement of teacher-student private expression that is not narrowly tailored to address a legitimate compelling State interest.

II. THE VIEWPOINT DISCRIMINATION ENGAGED IN BY THE STATE OF WASHINGTON IS NOT NARROWLY TAILORED TO PROSCRIBE UNLAWFUL ADVOCACY OR ANY OTHER VIOLENCE-INCITING EXPRESSION ON THE PART OF STUDENTS PURSUING THEOLOGY DEGREES.

This Court has noted that "our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *R.A.V. v. St. Paul*, 505 U.S. 377, 382-383 (1992) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). Article I, § 11 of the Washington Constitution (hereinafter referred to as the "Washington Blaine Amendment") manifests the sentiment, held by many influential political, educational, and social leaders at the time the Washington Blaine Amendment was adopted, that Catholic religious expression could be so categorized.

The sweeping scope of the Washington Blaine Amendment's prohibition on the appropriation of public money or property for *any* religious worship, exercise, or instruction (even in cases where comparable secular activities are publicly funded) blurs the distinction, recently articulated by this Court, between engaging in "constitutionally proscribable" speech and engaging in "core political" speech. *Virginia v. Black*, ___ U.S. ___, 123 S.Ct. 1536, 1551 (2003). Such a prohibition "chills constitutionally protected political speech because of the possibility that the State" will penalize via viewpoint discrimination in the postsecondary educational speech forum, "somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect." *Ibid.*

A. The Washington Blaine Amendment is Not Narrowly Tailored to Abridge Only Speech That Falls Within the Traditional Categories of Constitutionally Proscribable Speech.

This Court recognizes three categories of constitutionally proscribable speech.

First, a State may punish those words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky*, 315 U.S., at 572. Such fighting words—"those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction"—are generally proscribable under the First Amendment. *Virginia v. Black*, 123 S.Ct., at 1547 (quoting *Cohen v. California*, 403 U.S. 15, 20 (1971)).

Secondly, the First Amendment allows a State to forbid or proscribe advocacy of the use of force or of law violation "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447

(1969) (*per curiam*). The proscription of such advocacy lessens the likelihood of "coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties." *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

Thirdly, the First Amendment permits a State to ban a "true threat." *Watts v. United States*, 394 U.S. 705, 708 (1969) (*per curiam*) (internal quotation marks omitted). "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 123 S.Ct., at 1548 (citing *Watts*, 394 U.S., at 708; *R.A.V.*, 505 U.S., at 388).

Petitioners have presented no evidence that the postsecondary educational speech of theology students and their teachers falls within any of the three constitutionally proscribable categories of speech. The State of Washington relies on the presumption, implicit in the Washington Blaine Amendment, that teaching theology from a purely religious perspective constitutes constitutionally proscribable speech. Such a presumption, based solely on historical political, philosophical, and professional fears relating to the possible negative influence of Roman Catholicism on the fabric of American society, is an unconstitutional one.

In *Virginia v. Black*, this Court struck down a Virginia statute that made it a felony to burn a cross on the property of another with the intent of intimidating any person or group. This Court did so because the statute made any such burning prima facie evidence of an intention to intimidate a person or group. "The prima facie evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate." *Virginia v. Black*, 123 S.Ct., at 1551. Thus, "the provision permits the Commonwealth to arrest, prosecute,

and convict a person based solely on the fact of cross burning itself" without considering whether the evidence supported a finding that the intent of the cross burning was not to intimidate but to make "a statement of ideology, a symbol of group solidarity." *Id.*, at 1550-1551.

The Washington Blaine Amendment emanates from the nineteenth century belief that the Roman Catholic faith was a political, philosophical, and professional threat to maintaining the fabric of American society. In part, this anti-Catholic bigotry was attributable to statements of ideology and symbols of group solidarity expressed and practiced by Catholic immigrants and their leaders. In this respect, the Washington Blaine Amendment gives rise to the most unjust of results: individuals who use a burning cross to engage in one of the world's most notorious practices of racial and ethnic hatred against humanity cannot be presumed to have done so with an intent to intimidate; yet, theology majors who choose to devote their postsecondary educational careers to examining of the role of the Cross in service to humanity are presumed to intend to establish a religion unjustifiably feared to undermine the fabric of American society.

The Washington Blaine Amendment fails to require the production of contextual evidence to determine whether theological classroom speech is constitutionally proscribable through viewpoint discrimination or, alternatively, is constitutionally protected core political speech that requires equal access to public funds. This Court has held "that when the constitutional right to speak is sought to be deterred by a State's general taxing program due process demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition." *Speiser*, 357 U.S., at 528-529.

In *Speiser*, this Court dealt with the alleged unlawful advocacy against the government which might result from failing to secure a signed loyalty oath from veterans claiming

a veterans' property tax exemption provided under the California Constitution. This Court determined that the State of California had not produced sufficient proof of the potential for unlawful advocacy against the government that would justify the inhibition of the right of veterans to speak freely. This Court rejected the argument of the State of California "that veterans as a class occupy a position of special trust and influence in the community, and therefore any veteran who engages in the proscribed advocacy constitutes a special danger to the State." *Id.*, at 528. In the opinion of this Court, if sufficient evidence existed to show that, as a class, veterans were "persons supposed to be dangerous" in the manner of misusing a position of trust "to the detriment of the public," then the State of California would have been justified in compelling, through denial of a property tax exemption, veteran applicants to sign a loyalty oath. *Id.*, at 527.

If there is evidence that a theology major has engaged in constitutionally proscribable speech, the State of Washington can act against the theology major "only as it can act against any other citizen, by imposing penalties to deter the unlawful conduct." *Id.*, at 528. Until such conduct arises, the State of Washington "clearly has no such compelling interest at stake as to justify a short-cut procedure which must inevitably result in suppressing protected speech." *Id.*, at 529.

In *Speiser*, this Court ruled that "the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech. The denial is 'frankly aimed at the suppression of dangerous ideas.'" *Id.*, at 519 (quoting *American Communications Assn. v. Douds*, 339 U.S. 382, 402 (1950)). Likewise, the denial of Promise scholarships to otherwise scholarship-eligible theology majors is aimed at the suppression of dangerous ideas, "ideas thought inimical to the Government's own interest." *Velazquez*, 531 U.S., at 549 (citing *Regan v. Taxation With Representation of Wash.*, 461

U.S., at 548; *Speiser*, 357 U.S., at 519). This Court's First Amendment cases "draw vital distinctions between words and deeds, between ideas and conduct." *Free Speech Coalition*, 122 S.Ct., at 1403.

B. The Washington Blaine Amendment Chills Constitutionally Protected Core Political Speech.

History evidences that the adoption of the Washington Blaine Amendment resulted from a perfect storm of anti-Catholic sentiment emanating from three religious groups: Nativist Protestants, Secularist Freethinkers, and Positivist Progressives. Respectively, these three groups had political, philosophical, and professional fears regarding the relationship between the Roman Catholic Church and a growing immigrant Catholic population in America. These fears resulted in an effort to eliminate the likelihood that Catholic institutions would have equal access to public funds for the conduct of counseling, educational and social welfare services and the core political speech relating thereto.

Nativist Protestants had *political* concerns regarding the growing power of immigrant Catholics and the Catholic Church hierarchy in America. As early as 1856, the fear was widely expressed that Roman Catholic bishops in America:

> secure the best and most productive real estate in our large cities, they support missions in a country flooded with Gospel light, they penetrate the wilderness, and are enabled to compass sea and land, not to preach the Gospel of Christ, but to build up a colossal power which shall be felt in the political world, and which shall enable the Church of Rome to control and shape the destinies of the sons of Pilgrims.

Justin Fulton, *The Outlook of Freedom: or The Roman Catholic Element in American History*, 200 (1856).

The fifth article of the Platform of the American Party, adopted by its National Council on February 21, 1856,

provided that "No person should be selected for political station (whether of native or foreign birth) who recognizes any allegiance or obligation of any description to any foreign prince, potentate, or power, or who refuses to recognize the Federal and State Constitutions (each within its sphere) as paramount to all other laws, as rules of political action." James Chapman, *American versus Romanism; or The Cis-Atlantic Battle between Sam and the Pope*, vii, (1856).

In the view of this Court, "the American experience provides no persuasive support for the fear that clergymen in public office will be less careful of anti-establishment interests or less faithful to their oaths of civil office than their unordained counterparts." *McDaniel v. Paty*, 435 U.S. 618, 629 (1978). Absent evidence to the contrary, one must likewise assume that the American experience provides no persuasive support for the fear that those studying at State of Washington postsecondary educational institutions to become pastors or religious counselors or educators will seek to establish an anti-democratic theocracy in America.

The epicenter of anti-Catholic activity on the part of Nativist Protestants was in the area of education. In their opinion, the Catholic education of European immigrants was a threat to the fabric of American society which could be averted only through the creation of locally-controlled, publicly-funded common schools. The common school was viewed as "the principal digestive organ of the body politic" designed to "Americanize the children of immigrants." Rev. Josiah Strong, *Our Country: Its Possible Future and Its Present Crisis*, 92 (1891). Of course, the Americanization of children required Protestant religious instruction in the common school.[8]

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[8] As early as 1852, it was observed that:

> The son of an Irishman, a Frenchman, or Italian is an American, and he will not be a Romanist. We have a mill, of which the common

Meanwhile, Secularist Freethinkers had *philosophical* differences with Roman Catholics that required the elimination of all public financial support for Catholic educational and social welfare services. "To a world dominated by religious sentiment, [freethinkers] would offer one in which the spirit of scientific inquiry would prevail; instead of superstition, rational thought; and in place of the supernatural, the natural." Sidney Warren, *American Freethought, 1860-1914*, 20-21 (1966).

The objectives of the American secularists were given formal expression in the "Nine Demands of Liberalism" which were first published in 1872 and which included, among other things, that "all public appropriations for sectarian, educational and charitable institutions should be discouraged." *Id.*, at 161-162. The achievement of the "Nine Demands of Liberalism" was one of five goals pursued the National Liberal League, formed at a national assembly of secularists held on July 4, 1876, twenty-three years prior to the adoption of the original Washington Constitution. Throughout the 1880s, many localities of a sizeable population had in their midst a local chapter of the Liberal League that was "primarily concerned with discussing the question of church interference with secular life." *Id.*, at 30-31.

During the 1880s, the "high priest of the [freethought] movement was Robert Green Ingersoll." *Id.*, at 37. According to Ingersoll in a speech delivered on January 29, 1872, freethinkers were "laying the foundations of the grand temple of the future" wherein "with appropriate rites, will be

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> school is the nether, and the Bible and its institutions the upper stone; into this mill let us cast the people of all countries and forms of religion that come here, and they will come out of the grist American and Protestants. And the highest wisdom of our country is to keep this mill in vigorous operation.

Kirwan, *Romanism at Home: Letters to the Hon. Roger B. Taney, Chief Justice of the United States*, 249-250 (1852).

celebrated the religion of Humanity" when "REASON, throned upon the world's brain, shall be the King of Kings, and God of Gods." Robert Ingersoll, "The Gods," *On the Gods and Other Essays*, 56 (1990). It was the Secularist Freethinker Ingersoll who gave the famous "Plumed Knight" speech in support of the Presidential nomination of his close friend, U.S. Senator James G. Blaine, at the 1876 Republican National Convention. In the speech, Ingersoll remarked that the Republicans of the United States "demand a man who believes in the eternal separation and divorcement of church and school." Robert Ingersoll, "Speech at Cincinnati," *The Works of Robert G. Ingersoll*, Vol. 9, 58 (1900). Blaine narrowly lost the Presidential nomination to Rutherford B. Hayes.

During September of 1868, Ingersoll and Blaine had forged a friendship during a two-week Ingersoll speaking tour in Maine arranged at Blaine's insistence. It is likely that, over the course of their seven-year friendship prior to Blaine's 1875 campaign for a Constitutional ban on the allocation of public school funds to religious institutions, Ingersoll (one of history's most persuasive orators) influenced Blaine to adopt a strictly secularist attitude toward the public financing of education. By 1875, Blaine had earned a national reputation as a Republican political leader who well understood the importance of using the "Catholic question" against the Democratic Party.[9]

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[9] In 1875, the Republican candidate for governor of Ohio, Rutherford B. Hayes (afterward President), made the Catholic question part of his campaign. He wrote to James Blaine from his home in Fremont: "The secret of our enthusiastic convention is the school question. . . . We have been losing strength in Ohio for several years by emigration of Republican farmers. . . . In their place have come Catholic foreigners. Last year . . . they had 17,000 majority. . . . In the cities this spring, we are still more decisively beaten. . . . We shall crowd them on the school and other State issues." Richard Gabel, *Public Funds for Church and Private Schools*, 485, fn. 28 (citing Gail Hamilton, *Biography of James G. Blaine*,

Finally, Positivist Progressives in late nineteenth-century America had *professional* differences with the Roman Catholic Church. Positivism, a socio-religious philosophy founded by Auguste Comte in France during the mid-nineteenth century, sought to provide an empirical and naturalistic methodology for social reconstruction. "One of the most neglected currents in the American context has been the positivism of Auguste Comte." Gillis Harp, *Positivist Republic: Auguste Comte and the Reconstruction of American Liberalism, 1865-1920*, 10 (1995). From the American Positivist perspective, only social science could bring order to a post-Civil War civilization suffering from the chaos wrought by the dual forces of individualistic, laissez-faire capitalism and superstitious Christian faith. The influence of the Roman Catholic Church was an anathema to Progressive social scientists eager to tame the urban masses through the application of empirical research and scientific methods.

One of America's first social scientists, Lester F. Ward, was a strong adherent of Positivism. Ward's "government service bolstered his confidence in the ability of the bureaucratic state to manage society and solve problems" *Id.*, at 118.[10] Through his years in government service, "Ward saw government-sponsored scientists and bureaucrats pursuing research and offering expert advice to policymakers." *Ibid.* During the decade of the 1870s:

> The philosophy that underlay the Washington [D.C.] community blended a positivist empiricism with a naïve scientism and a bureaucratic elitism. Members of the circle were concerned with finding and collecting a mass

373 (1895), C. R. Williams (ed.), *Diary and Letters of Rutherford Birchard Hayes*, III, 271-281 (1924)).

[10] Ward landed a job in May 1865 as an accounts clerk within the Treasury Department. The new federal Bureau of Statistics hired him in 1867 and he became librarian of the Bureau five years later. Ward joined the newly created Geological Survey in 1881.

> of varied data about their society. To find out more about the republic and to collate systematically this vast body of knowledge was seen as an important civic duty. Such men viewed science as more than just an empirical method; science was a progressive and integrating worldview that implied social improvement and reform.

Id., at 121. However, progress in the new field of social science in the 1870s had required a hostile attitude toward theology in the preceding decade.

During the 1860s, Lester Ward, with a few office friends, had formed the National Liberal Reform League—a secret secularist organization dedicated to the refutation of "the leading doctrinal teachings of the so-called Catholic and Evangelical Protestant Churches." *Id.*, at 123 (quoting Clifford Scott, *Lester Frank Ward*, 139 (1976)). The League's aim was to encourage the formation of affiliated groups in other cities and Ward appealed to all "Liberals, Skeptics, Infidels, Secularists, Utilitarians, Socialists, Positivists, Spiritualists, Deists, Theists, Pantheists, Atheists, [and] Free-thinkers." *Ibid.* (quoting Bernhard Stern, ed., *Young Ward's Diary*, 314-315 (1935)). According to Ward, secularism was equally important as science in securing social progress and only with an educational system "unfettered by theology" could the condition of the people be improved. Lester Ward, "The Situation," *Iconoclast*, 1 (March 1870).

Yet Ward, and the Positivist Progressives that followed him, recognized that the dictates of social order required them to "search for a secular surrogate for traditional Christian faith." Harp, *Positivist Republic* 125. Ward "showed a singular enthusiasm for the religious implications of scientific truths. . . Via scientism, then, social progress was substituted for a personal god as the object of worship." *Ibid.*

For one of America's renowned social scientists, Herbert Croly, the search for a secular religious substitute for

Christianity ended with the conclusion that "American democracy can be advanced only by an increasing nationalization of the American people in ideas, in institutions, and in spirit." Herbert Croly, *The Promise of American Life*, 271 (1909). For Croly, as for Comte and Ward before him, it was only through a Positivist priesthood of elite civil service technocrats that these national ideas and institutions could be realized: "A democracy cannot dispense with the solidarity which it imparted to American life, and in one way or another such solidarity must be restored." *Id.*, at 139.

Thus, throughout the late nineteenth and early twentieth centuries, Nativist Protestants, Secularist Freethinkers, and Positivist Progressives supported legal and regulatory efforts designed to abridge the core political speech of Roman Catholic immigrants and their leaders. As planned, the resulting constitutional prohibitions and limitations on public funding of faith-based counseling, educational, and social welfare services placed the Catholic Church and other faith-based organizations at competitive disadvantage in the face of a rapidly expanding government-funded welfare state.

In the absence of constitutionally proscribable speech, a level playing field must be "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). By tilting the playing field in favor of students who are willing to pursue secular counseling, education, or social work degrees from postsecondary educational institutions, the State of Washington provides non-theistic scientific or ethical viewpoints with a discriminatory advantage in the marketplace of ideas pertaining to the maintenance of the fabric of society. Such viewpoint discrimination penalizes aspiring religious leaders who might challenge the status quo by promoting theistic viewpoints regarding youth character education, marital and family relations, and economic, criminal, and environmental justice.

C. The State of Washington Has Produced No Evidence Which Justifies the Use of Viewpoint Discrimination as a Short-Cut Procedure to Suppress the Expression of Ideas for Political and Social Changes on the Part of Teachers and Students Engaged in Postsecondary Educational Discourse.

Some supporters of the Washington Blaine Amendment maintain that, "the Catholic Church had every right to advance its political positions, *Paty, supra.* But its opponents were not forced by the First Amendment into silence. They were entitled to respond vigorously to its efforts without being subsequently condemned as bigots." Brief of the American Jewish Congress, on behalf of itself, the American Federation of Teachers, the American Jewish Committee, and the Baptist Joint Committee on Public Affairs *Amici Curiae* 29. Unfortunately, the vigorous response adopted by the State of Washington and other states—the passage and implementation of broad prohibitions on the public funding of any religious worship, exercise, or instruction—went beyond the proscription of speech permitted under the First Amendment. "When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in light of the particular circumstances to which it is applied." *Speiser*, 357 U.S., at 520.

For those members of this Court inclined to consider cases decided by foreign courts relating to a government's abridgement of religious and political speech, the Grand Chamber of the European Court of Human Rights (hereinafter "ECHR") recently decided that Turkey had lawfully dissolved Refah Partisi (The Welfare Party). *Refah Partisi v. Turkey*, ECHR App. No. 41340/98 (2003).

Refah Partisi (hereinafter "Refah") was a political party founded on July 19, 1983. The results of the 1995 general election made Refah the largest political party in the Turkish parliament. On June 28, 1996, Refah came to power by forming a coalition government with the center-right True Path Party (*Dogru Yol Partisi*). According to an opinion poll carried out in January 1997, if a general election had been held at that time, Refah would have obtained 38% of the votes. The same poll predicted that Refah might obtain 67% of the votes in the general election to be held roughly four years later. *Id.*, at § 10. On January 16, 1998, the Turkish Constitutional Court dissolved Refah as a political party on the ground that it had become a "centre of activities contrary to the principle of secularism." *Id.*, at § 23. The ECHR upheld the dissolution in light of the evidence showing that (i) Refah intended to set up a plurality of legal systems, leading to discrimination based on religious beliefs; (ii) Refah intended to apply sharia [religious legal system] to the internal or external relations of the Muslim community within the context of this plurality of legal systems; and (iii) Refah members publicly advocated the possible recourse to force as a political method. *Id.*, at § 116.

Article 11 § 2 of the European Convention on Human Rights (hereinafter the "Convention") prohibits the placement of restrictions on the right to freedom of peaceful assembly and association "other than such as are prescribed by law and are *necessary in a democratic society* in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others." (emphasis added). Due to the existence of "convincing and compelling reasons" showing that the dissolution of Refah and the forfeiture of political rights met a "pressing social need" and were "proportionate to the aims pursued," the ECHR determined that Refah's dissolution may be regarded

as "necessary in a democratic society." *Id.*, at § 135. The ECHR affirmed that a Contracting Party to the Convention "may legitimately prevent the application within its jurisdiction of private-law rules of religious inspiration prejudicial to public order and the values of democracy."[11] *Id.*, at § 128.

It is clear that, under the First Amendment (and considering the non-binding comparative analysis set forth in *Partisi*), the State of Washington has provided no evidence of unlawful advocacy or other constitutionally proscribable speech on the part of theology students that would justify the imposition of a financial penalty that discriminates against their religious viewpoints on political and cultural changes necessary to maintain the fabric of society.

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[11] The ECHR's overall examination of the question whether the dissolution of a political party on account of a risk of democratic principles being undermined met a "pressing social need" must concentrate on the following points:

> (i) whether there was plausible evidence that the risk to democracy, supposing it had been proved to exist, was sufficiently imminent; (ii) whether the acts and speeches of the leaders and members of the political party concerned were imputable to the party as a whole; and (iii) whether the acts and speeches imputable to the political party formed a whole which gave a clear picture of a model society conceived and advocated by the party which was incompatible with the concept of a "democratic society."

Id., at § 104.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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September 5, 2003

Court, U.S.
E D

No. 02-1315 SEP 8 -2003

In the
Supreme Court of the United States

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, ET AL.,

Petitioners,

v.

JOSHUA DAVEY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE FAIRNESS FOUNDATION *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Where a State chooses to award scholarships based on neutral criteria to financially needy, academically gifted students, does the State violate the First and Fourteenth Amendments to the U.S. Constitution when it discriminatorily strips the scholarship from an otherwise eligible student for the sole reason that the student declares a major in theology taught from a religious perspective.

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INTRODUCTION AND INTEREST OF AMICUS[1]

This Court's religion decisions have been guided above all by one fundamental principle: The government's involvement with religion is limited to an evenhanded respect for all of the diverse beliefs of its citizens. The fundamental principle, in short, is one of nondiscrimination.

The State of Washington statutes and regulations invalidated below are infirm precisely because they depart from the Constitution's mandate of evenhandedness in favor of a viewpoint-based prohibition on the use of Promise Scholarships for the study of theology "taught from a religious perspective." Pet. App. 15a; *see also* Pet. Br. 5; Wash. Rev. Code 28B.119.010(8) (Pet. App. 95a); Wash. Admin. Code 250-80-020(12)(g) (JA 180). The irony of Washington State's discrimination-infected legal structure is this: devotees of Marxism may use Promise Scholarships to pursue degrees in accredited departments that school students in the idea that "religion is the opiate of the masses." Karl Marx, INTRODUCTION TO A CRITIQUE OF THE HEGELIAN PHILOSOPHY OF RIGHT (1844). But Christians, like respondent Joshua Davey, may *not* use their Promise Scholarships to pursue religious studies taking the view that faith offers a window onto the most profound truths about the human experience. Under current law, Promise Scholarships may be used to study religion from a standpoint of agnosticism, skepticism, condescension, or hostility. In

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[1] Pursuant to Supreme Court Rule 37.6, the Fairness Foundation states that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than the Fairness Foundation and its counsel, contributed monetarily to the preparation or submission of this brief. The Fairness Foundation is grateful to law students Daniel Kearney, Joe Novak, and Evan Young for their assistance in researching and preparing an early draft of this brief.

fact, Promise Scholarships may be used for the study of religion from every conceivable standpoint, *except* the most traditional, commonplace standpoint down through the ages—the standpoint of faith.

The Fairness Foundation respectfully submits this brief, its first before the Court, in order to explain, from its perspective, the constitutional infirmities of Washington's discriminatory treatment of faith-based religious viewpoints. The Fairness Foundation is deeply involved in private philanthropy aimed at the forging of public-private partnerships to remove obstacles that too often prevent poorer students from achieving adequate primary and secondary educations. The Fairness Foundation has learned, through experience gained in the course of fulfilling its mission, that some of the most persistent hurdles impeding assistance from reaching needy students trapped in underachieving schools is the commonplace misconception that our Constitution favors hostility—as opposed to benevolent neutrality, *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970)—in matters of religion. The Fairness Foundation—and the needy students it seeks to assist—have vital stakes in ensuring this Court's adherence to the Constitution's mandate of religious evenhandedness.

SUMMARY OF ARGUMENT

1. This brief assumes the undisputed facts established in the record below. Most importantly, those facts establish, and the State of Washington does not deny, that Washington revoked Joshua Davey's state-funded college scholarship solely because he chose to study a particular subject matter, religion, from a particular standpoint, through a lens of faith.

The record below reveals that, apart from Washington's viewpoint-based discrimination against faith-based religious

study, Promise Scholarships are awarded on straightforward, religiously neutral criteria: recipients must meet pre-set financial need standards; attend, at least half-time, an accredited college within Washington; and either be in the top 15% of their high school class, or attain a specified score on the SAT or ACT college entrance examinations. *See* Wash. Admin. Code 250-80-020(12) (JA 180). On the basis of these religiously neutral criteria, Mr. Davey initially was awarded a scholarship through a congratulatory letter signed by Washington's Governor Locke. JA 55-56. Mr. Davey chose to attend Northwest College, a Christian institution, in part because he is "a Christian…committed to living out [his] faith in every aspect of [his] life." JA 40. And largely for that same reason, once enrolled at Northwest, Mr. Davey declared a double major in business administration and pastoral ministries. JA 43. Upon learning of Mr. Davey's chosen pastoral ministries major, however, the State pirouetted and revoked Mr. Davey's scholarship. JA 97. The record facts thus make plain the character of Washington's exclusionary policy: Mr. Davey and other scholarship recipients may use Promise Scholarships for whatever college and course of study they choose, *except* if they choose to study one particular subject, religion, from one particular vantage point—that of faith.

2. These undisputed facts directly implicate an interconnecting web of basic doctrines arising under several constitutional provisions. Applying these interconnecting doctrines, the Court has held, time and again, that governmental discrimination based on religious distinctions triggers the closest, most searching judicial scrutiny. Laws of general applicability ordinarily embody and comply with the fundamental constitutional requirement of equal treatment and nondiscrimination. In contrast, laws of

particularized applicability, such as those targeting disfavored religious beliefs, practices, or groups, are almost always constitutionally infirm. Not only is the unconstitutionality of discriminatory law at the heart of the Court's Equal Protection jurisprudence, it has also animated the Court's Free Speech jurisprudence, *see Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), guided the development of recent Establishment Clause doctrine, *see Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997), and played a central role in the Court's most recent Free Exercise cases, *see Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

The simple, powerful command of nondiscrimination—equality under the law—thus separates out claims of those who demand preferential treatment or exemptions from generally applicable laws from those, like Mr. Davey, who ask for nothing more than judicial enforcement of the profound constitutional guarantees of evenhandedness. A vital principle that emerges from the Court's decisions is that the text-based Free Exercise guarantee *permits* (but does not require) the representative branches of government to protect religious liberty by adopting an attitude of "benevolent neutrality," *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987), while at the same time it *prohibits* the judicial branch from carving faith-based exceptions to otherwise generally applicable, religiously neutral laws. *See, e.g., Smith*, 494 U.S. at 878. In other words, if the representative branches wish to act in neutral fashion to ease burdens on religiously defined communities, they may well

be able to do so. What those branches cannot do is single out for unfavorable treatment a faith-defined group of citizens, be they religious or irreligious.

3. The Washington constitution's Blaine Amendment—and the Promise Scholarship restriction it produced—constitutes precisely the type of invidious discrimination forbidden under this Court's decisions. Washington's legislature enacted a law providing scholarships (on a generally applicable, religiously neutral basis) in order to encourage Washington's most promising students to attend in-state colleges. This enactment was wholly unexceptionable. Washington's salutary, religiously neutral law was then infected, however, by the admixture of a constitutionally poisonous limitation—the discriminatory proviso that singles out faith-based perspectives for disparately unfavorable treatment. As explained below, this discriminatory restriction renders invalid under the Equal Protection and Establishment Clauses (among other constitutional doctrines) any action taken under its auspices, including the decision depriving Mr. Davey of his otherwise-merited scholarship.

4. Washington has no legitimate interests, much less compelling ones, in discriminating against faith-based religious study. It argues that Joshua Davey has no right to government funding for his religious studies. True enough. But Washington never addresses the dispositive point that, notwithstanding government's undoubted control over the public fisc, it may not wield fiscal authority in such a manner as to enact anti-religious, viewpoint-based funding restrictions. Washington's argument that discrimination based on religious views is justified by the State's strong policy of enforcing strict separation of church and state was put to rest over two decades ago in *Widmar v. Vincent*, 454

U.S. 263 (1981). Where, as here, any benefits flowing to religious organizations are solely the result of genuine private choice, Washington has *no* Establishment Clause interest in preventing *private* decisions directing individualized education benefits from being used for faith-based, religious study. By discriminating on the basis of religion, Washington runs afoul of this Court's decisions mandating evenhandedness towards religion and, in particular, its jurisprudence under the Equal Protection and Establishment Clauses.

ARGUMENT

I. MULTIPLE CONSTITUTIONAL PROVISIONS PROHIBIT DISCRIMINATION ON THE BASIS OF RELIGION

The Court has "time and again held that the government may not treat people differently based on the God or gods they worship, or do not worship." *Board of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 714 (1994) (O'Connor, J., concurring). This fundamental principle of equal treatment transcends individual categories of doctrinal analysis. "[T]he Religion Clauses—the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Id.* at 715.

The Establishment Clause. The Establishment Clause has been the most frequent locus of decisions declaring that government may not discriminate in favor of or against religion in general, particular religions, or irreligion. The Court has held, in case after case, that "[g]overnment in our democracy, state and national, must be neutral in matters of

religious theory, doctrine, and practice." *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968). For "[t]he fullest realization of true religious liberty" requires that government "effect no favoritism among sects or between religion and nonreligion," and that it "work deterrence of no religious belief." *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 305-06 (1963) (Goldberg, J., concurring) (a "brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious" is prohibited). Because the "First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion," government may "not be hostile to any religion or to the advocacy of nonreligion." *Epperson*, 393 U.S. at 104. As the Court has noted in summarizing its holdings, "In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general." *Lukumi*, 508 U.S. at 532; *see also McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring).

The Court applied this nondiscrimination principle in *Larson v. Valente*, 456 U.S. 228 (1982), to invalidate under the Establishment Clause a state statute imposing registration and reporting requirements on certain religious organizations. The statute did not withstand scrutiny, the Court explained, because it did "not operate evenhandedly" and effected "*selective* legislative imposition of burdens and advantages upon particular" religious groups. *Id.* at 253-54 (emphasis in original). The nondiscrimination principle also informed this Court's decision sustaining Congress's equality-of-access-to-facilities mandate in *Board of Education v. Mergens*, 496 U.S. 226 (1990). *Mergens* rejected the bid of a local school board that sought to

separate out religious voices and deny them access to facilities based on what was undeniably a rule demanding disparate and unfavorable treatment.

This long progression of holdings applies as much to programs that uniquely single out religion for special burdens (or exclusions from benefits) as to programs singling out religion for special aid. Indeed, the Court has long held that a state may not exclude individuals "from receiving benefits of public welfare legislation" merely "because of their faith, or lack of it." *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947); *see also Kiryas Joel*, 512 U.S. at 698 ("religious people (or groups of religious people) cannot be denied the opportunity to exercise the rights of citizens simply because of their religious affiliations or commitments"). Government thus violates the Establishment Clause when it denies benefits to individuals on the basis of their religious choices.

As one dimension of nondiscrimination, States are obliged, under this Court's doctrine, to guard against appearing to endorse any particular religious *or* irreligious point of view. In her original articulation of this aspect of nondiscrimination, Justice O'Connor wrote: "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). The Court's post-*Lynch* decisions make clear that, even in the context of aid programs (like the Promise Scholarship), government must avoid the appearance of endorsing particular religious or irreligious perspectives. Avoiding the implication of endorsement is usually accomplished by ensuring that benefits are provided directly to an appropriately, neutrally

defined class of citizens, who, in turn, direct that aid to privately selected religious or nonreligious organizations through a process of "true private choice." *Zelman*, 536 U.S. at 649. In such circumstances, any "perceived endorsement" of a religious or irreligious message "is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits." *Id.* at 652; *see also Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 488-89 (1986); *Mergens*, 496 U.S. 226, 250 (1990). The Constitution's Establishment Clause guarantee is thus "respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001) (quoting *Rosenberger*, 515 U.S. at 839). That is this case.

The Free Exercise Clause. The anti-discrimination principle embedded in the Court's Establishment Clause jurisprudence finds its analogue in Free Exercise Clause decisions making equally plain that discrimination against religious choice or activity is impermissible. *See Lukumi*, 508 U.S. at 542 ("The Free Exercise Clause 'protects religious observers against unequal treatment'") (citing *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring)). The Free Exercise Clause thus prohibits states from imposing "special disabilities on the basis of religious views or religious status," *Smith*, 494 U.S. at 877, or compelling a choice "between the exercise of a First Amendment right and participation in an otherwise available public program." *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 716 (1981).

In *Lukumi*, the Court's most recent decision striking down a state law on Free Exercise grounds, the Court invalidated city ordinances regulating the ritual slaughter of animals because the "secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs." *Lukumi*, 508 U.S. at 524. Noting that "a law targeting religious beliefs as such is *never* permissible," *id.* at 533 (emphasis added), the Court declared that, "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons," *id.* at 532; *see also id.* at 534 (the "Free Exercise Clause protects against governmental hostility" toward religion). The state ordinances violated the Free Exercise Clause, the Court reasoned, because they imposed "gratuitous restrictions" on religious conduct and "singled out" conduct motivated by religious beliefs "for discriminatory treatment." *Id.* at 538.

Lukumi makes clear that under the Free Exercise Clause, as with the Establishment Clause, "[s]tate power is no more to be used so as to handicap religions, than it is to favor them." *Everson*, 330 U.S. at 18. Once again, the nondiscrimination principle commands evenhandedness. Government thus violates the Free Exercise Clause if it withdraws benefits under "an otherwise available public program" through discrimination against persons choosing to use their benefits for religious purposes or in religious contexts. *Thomas*, 450 U.S. at 716; *see also Smith*, 494 U.S. at 884 ("where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason"); *Lyng v. N.W. Indian Cemetery Prot. Ass'n*, 485 U.S. 439, 453 (1988) ("[t]he Constitution does not permit government to

discriminate against religions"); *Goldman v. Weinberger*, 475 U.S. 503, 513 (1986) (regulation held constitutional because "[i]t was not motivated by hostility against, or any special respect for, any religious faith"). A state violates the Free Exercise guarantee whenever it disqualifies applicants from receiving *generally available benefits* solely because of their religious beliefs. *See Hobbie*, 480 U.S. 136; *Thomas*, 450 U.S. 707; *Sherbert v. Verner*, 374 U.S. 398 (1963).

Judicial enforcement of this bedrock neutrality-based principle is in no wise inconsistent with fundamental values of majoritarian rule in policymaking. The Court has thus held that, "[i]n the enforcement of a facially neutral and uniformly applicable requirement for the administration of welfare programs reaching many people, the Government is entitled to wide latitude." *Bowen v. Roy*, 476 U.S. 693, 707 (1986); *see also Smith*, 494 U.S. at 883. Because government could not operate "if it were required to satisfy every citizen's religious needs and desires," *Lyng*, 485 U.S. at 452, the Court has been called upon to define circumstances under which regulations intended to advance neutral, secular goals might nonetheless "*indirectly* and *incidentally*" impose too high a burden on religion. *Bowen*, 476 U.S. at 706 (emphasis added); *compare Hernandez v. Comm'r*, 490 U.S. 680 (1989) (rejecting free exercise challenge to payment of income taxes alleged to make religious activities more difficult) *with Wisconsin v. Yoder*, 406 U.S. 205 (1972) (upholding free exercise challenge to state's compulsory school-attendance laws).

But that is far afield from the case at hand. Whatever the scope of the Free Exercise Clause when government imposes *indirect* and *incidental* burdens on religion, the Court has never wavered from the precept that, at bottom, government may not "discriminate against particular religious beliefs or

against religion in general." *Bowen*, 476 U.S. at 707-08; *Smith*, 494 U.S. 872, 877 (1990) (the government may not "impose special disabilities on the basis of religious views or religious status"). Such discrimination would "manifest a governmental hostility to religion [and] religious teachings" that would be "at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion." *McCollum v. Board of Educ.*, 333 U.S. 203, 211-12 (1948).

Freedom of Religious Speech. Parallel principles of nondiscrimination have also informed this Court's decisions in cases involving religious speech. Under the Free Speech Clause, a state may not exclude religious points of view from an open forum that the state itself has created. *See Good News Club*, 533 U.S. at 107-12. This principle, the Court has recognized, applies with undiminished force where the speech in question covers religious topics. *See Rosenberger*, 515 U.S. at 845-46; *Lamb's Chapel*, 508 U.S at 393-95; *Widmar*, 454 U.S. at 277.

In *Rosenberger*, for instance, the Court condemned the University of Virginia's exclusion of a Christian-focused student publication from financial assistance provided generally to all other student publications. *See* 515 U.S. at 831; *see also id.* at 852 (O'Connor, J., concurring). Denying funding to the group "discriminated on the basis of the magazine's religious viewpoint in violation of the Free Speech Clause." *Id.* at 852 (O'Connor, J., concurring). In addition, such discrimination would "risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." *Id.* at 845-46.

Rosenberger stands in an impressive, stare-decisis-deserving line of decisions giving expression to

the nondiscrimination principle—an unbroken line reaching from *Good News Club* back through *Rosenberger*, to *Lamb's Chapel*, to *Mergens*, and to the fountainhead *Widmar* decision. *Widmar* stands, above all, for the constitutional principle that government need not confer public benefits at all, but public benefits, once conferred, may not unjustifiably shut out religious points of view. 454 U.S. at 267.

The Equal Protection Clause. Finally, this Court's nondiscrimination principles have been applied under constitutional rubrics located entirely outside the First Amendment. Most obviously, discrimination based on religion implicates principles at the heart of the Equal Protection Clause. *See, e.g., Oyler v. Boles*, 368 U.S. 448, 456 (1962) (state law enforcement may not be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification"). Simply put, government "must treat citizens as individuals, and not as members of racial, ethnic, or religious groups." *Missouri v. Jenkins*, 515 U.S. 70, 120-21 (1995) (Thomas, J., concurring). As Justice Frankfurter long ago explained, "to allow expression of religious views by some and deny the same privilege to others merely because they or their views are unpopular, even deeply so, is a denial of equal protection of the law forbidden by the Fourteenth Amendment." *Niemotko v. Maryland*, 340 U.S. 268, 284 (1951) (Frankfurter, J., concurring); *see also McDaniel*, 435 U.S. at 643-46 (White, J., concurring). Accordingly, "[w]hen a state distributes benefits unequally"—imposing burdens on some groups, but not others—"the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment." *Zobel v. Williams*, 457 U.S. 55, 60 (1982).

Religious Accommodation. In light of this Court's oft-repeated strictures against discrimination based on

religious belief, practice, or viewpoint, it bears emphasis that the constitutional nondiscrimination rule in no way prevents government from taking into account the centrality, vitality, and diversity of religion in contemporary American life. So long as the government acts even-handedly, the political branches are free to take steps to relieve religious groups from the special burdens sometimes imposed by the law. *See Amos*, 483 U.S. at 334-35. The Court has "long recognized" that "government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Id.* at 335 (quoting *Hobbie*, 480 U.S. at 144-45). It has recognized in particular that the Establishment Clause is capacious and flexible enough to allow a "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.* (quoting *Walz*, 397 U.S. at 669); *see also Zelman*, 536 U.S. at 669-70 (O'Connor, J., concurring). While always "bound to observe strict neutrality" between different beliefs, federal and state officials enjoy leeway, through the give-and-take of representative democracy, to experiment with laws designed to serve regulatory goals, yet accommodate religious belief and practice. *See Walz*, 397 U.S. at 669. As Justice Thomas recently noted, "[s]tates may pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights" and so long as they "observe strict neutrality." *Zelman*, 536 U.S. at 678-79 (Thomas, J., concurring).

II. THE WASHINGTON SCHOLARSHIP PROGRAM UNCONSTITUTIONALLY DISCRIMINATES ON THE BASIS OF RELIGION

Application of these fundamental nondiscrimination principles manifestly condemns Washington's decision to strip financially needy students of scholarship funding based

on the religious viewpoints adopted in their studies. Most obviously, under this Court's case law, Washington has violated the Equal Protection and Establishment Clauses by discriminating on the basis of religious viewpoint.

A. Washington's Viewpoint-Based Restriction On The Use Of Promise Scholarship Funds Is Discriminatory In Both Purpose And Effect

In a wide variety of contexts, the Court, when asked to weigh a government program for evidence of unconstitutional discrimination, has focused on the program's primary purpose and effect. *See, e.g., Zelman*, 538 U.S. at 648-49 (Establishment Clause); *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (Equal Protection Clause). Where government programs have had the forbidden purpose and effect of advancing or inhibiting religion, or burdening a suspect class of citizens, this Court has not hesitated to strike down such programs. Here, the court of appeals correctly determined that Washington's statute and regulations are discriminatory because they prohibit receipt of scholarship funds by students seeking to use them to study religion from a faith-based perspective.

1. The Manifest Purpose Of The Restriction Is To Discriminate

Any doubt that the Promise Scholarship program intentionally discriminates against religious faith is answered by the fact that the restriction is the consequence of Washington's version of the Blaine Amendment. State versions of the Blaine Amendment were adopted out of deep-seated animosity towards organized religion in general and Catholicism in particular. *See Mitchell*, 530 U.S. at 828-29 (plurality opinion) (discussing the Blaine Amendment and stating that "hostility to aid to pervasively

sectarian schools has a shameful pedigree that we do not hesitate to disavow"). Rather than protect religious liberty, as Washington suggests, the Blaine Amendment (like the invidious policies it has produced) was intended to substantially reduce religious freedoms. *See generally* Philip Hamburger, SEPARATION OF CHURCH AND STATE 296-334 (2002). As a state weapon aimed directly (and exclusively) at religious faith, the Blaine Amendment is an ugly remnant of a tragically dark side of the national experience.

Significantly, the incorporation of the Blaine Amendment into Washington's constitution was not the result of healthy social experimentation at the state level. To the contrary, the Amendment was effectively forced on Washington by Congress, which in 1876 required that all new states admitted to the Union include a provision for the establishment and maintenance of public schools that were "free from sectarian control." Robert F. Utter & Hugh D. Spitzer, THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE 26 (2002). This provision was included in Section 4 of Washington's Enabling Act and served as a model for Article I, section 11 of Washington's Constitution. *See id.* The Congressional requirement that public schools be free from sectarian control, and its related principle of no aid to religion, was passed only following Congress's failed attempt to amend the federal Constitution to effect a total separation of church and state in a way never contemplated by the First Amendment. *See* Hamburger, SEPARATION, at 296-302.

In sharp contrast to the Blaine Amendment, which embodies hostility towards certain religious beliefs, the Founders fashioned the First Amendment to ensure that civil legislation did not discriminate on account of religious differences. *See* Hamburger, SEPARATION, at 12-14. At the

Founding, freedom of religion was seen to encompass both worship and similarly strong feelings of conscience. *See* Benjamin Franklin, *A New Version of the Lord's Prayer* (1768), *reprinted in* THE PAPERS OF BENJAMIN FRANKLIN, at 301 (William Wilcox *et al.*, eds., 1959) ("[w]e have in our Language no *proper Name* for God; the Word *God* being a common or general Name, expressing all chief Objects of Worship, true or false"). Accordingly, the First Amendment, with its promise of religious liberty, was not supposed to erect an impenetrable barrier between government and religion, but rather ensure equality of all rights held under law without regard to religious differences. *See* Hamburger, SEPARATION, at 96-97 (quoting Samuel Stillman, A SERMON 29 (Boston 1779) ("The authority by which he [*i.e.*, the 'magistrate'] acts he derives alike from *all the people*, [and] consequently he should exercise that authority *equally* for the benefit of *all*, without any respect to their different religious principles.") (emphasis in original)). By these lights, the Washington scholarship program's religious restriction was enacted for manifestly invalid reasons. Just like the viewpoint-based discrimination struck down in *Rosenberger*, Washington's restriction acts purposefully to burden certain religious beliefs and the individuals adhering to them.

2. The Effect Of The Restriction Is To Discriminate

The Promise Scholarship program also has a discriminatory effect. Whether one sees Washington's restriction as a regulation of conduct (Davey's training for the ministry) or of religious conviction (Davey's choices motivated by his belief), there can be no doubt that needy students eligible for Promise Scholarships, who would otherwise seek a theology degree and pursue a career in the

ministry, are given a financial incentive to choose some other degree and some other vocation. *Cf. McDaniel*, 435 U.S. at 631. ("The characterization of the exclusion as one burdening appellant's 'career or calling' and not religious belief cannot withstand analysis"). Washington's restriction entices students to avoid the educational prerequisites for religious vocations by restricting scholarship funding based on religious viewpoint. Financially needy, academically gifted high-school graduates are told, in effect, that a scholarship can be theirs—provided they refrain from studying theology from a perspective of faith. Washington thus does exactly what the multiple, related constitutional bars against religious discrimination prohibit: it "impose[s] special disabilities on the basis of religious views or religious status." *Smith*, 494 U.S. at 877.

Besides creating disincentives for choosing careers in the ministry, Washington's restriction has other pernicious effects. Most fundamentally, restricting funding for faith-based religious study works against the Promise Scholarship's primary goal of promoting higher education. Because students, particularly poorer students, active in their communities of faith are likely to "seek more education," *see* Yong Dai, *Educ. Plans After High Sch.: A Nat'l Survey of High Sch. Seniors*, 30 J. OF RES. & DEV. IN EDUC. 1, 22 (1996), Washington's discriminatory restriction affirmatively undercuts the Promise Scholarship program's core educational objectives.

More subtly, the exclusion of religious study from Promise Scholarship funding creates a false and invidious impression that religious study is somehow less worthy than other avenues of inquiry. This condescension can be seen in Washington's briefing, where it deems the religious perspective something less than truly "academic." Pet Br.

12. This secularist snobbery has no place in our law. Partly in response to the pervasiveness of this elitist condescension, some scholars have gone so far as to assert that "the self-conscious cultivation of a spiritually informed ethos of inquiry" is "*indispensable* to learning and teaching." Mark R. Schwein, EXILES FROM EDEN: RELIGION AND THE ACADEMIC VOCATION IN AMERICA 45 (1993) (emphasis added). "Whether we look to the Platonic Academy or to the teachers of ancient Israel or to St. Augustine at Cassiciacum or to the medieval university or to Pico della Mirandola's disputatious Florence, we will find learning flourishing in communities formed by the conscious practice of spiritual values." *Id.* at 45-46 (arguing that "'enlighted' secular rationalism" has become a favored viewpoint in college and university education); *see also Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979) (public education helps prepare "individuals for participation as citizens, and in the preservation of the values on which our society rests").

But this case is not the venue for that ongoing, and increasingly lively debate. For present purposes, the Court need only recognize that the purposeful *exclusion* of faith-oriented religious study from the approved menu of educational options communicates, not so subtly, a message of endorsement of the non-faith (and anti-faith) approaches to religious inquiry while at the same time communicating a concomitant, statist disapproval of faith-based approaches. As Mr. Davey succinctly put it, "I felt that I was a second-class citizen in the eyes of the state." JA 46. That is Washington's message, and it is a profoundly unconstitutional one.

B. Washington's Viewpoint-Based Restriction Fails To Pass Muster Under Multiple Constitutional Doctrines

The court of appeals held, rightly, that Washington's discriminatory restriction fails to pass muster under the Free Exercise Clause. But quite apart from the Free Exercise and Free Speech analysis undertaken by the court below, the state-imposed exclusion fails muster under both the Equal Protection and Establishment Clauses. *See* Compl. (JA 12-13) (pleading Equal Protection and Establishment Clause claims). This Court's decisions under both Clauses make clear that because Washington must act with an evenhanded respect for the diverse religious (and irreligious) beliefs of its citizens, its Promise Scholarship exclusion is unconstitutional.

At the outset, independent of fundamental First Amendment shortcomings, Washington's restriction violates the Equal Protection Clause of the Fourteenth Amendment. States presumptively violate equal protection where, as here, they create classifications resting on suspect grounds, such as race or religion, and then afford disparate treatment to different citizens based on those classifications. In such circumstances, a state must come forward with some compelling government interest to justifying the disparity and prove that its law is narrowly tailored to achieve that interest. *See, e.g.*, *Lukumi*, 508 U.S. at 546; *Grutter v. Bollinger*, 123 S. Ct. 2325, 2338 (2003). Just as this Court gives the "most exacting scrutiny" to laws that "make classifications based on race, or on the content of speech," so too, it must "strictly scrutinize governmental classifications based on religion." *Smith*, 494 U.S. at 886 n.3; *see also Kiryas Joel*, 512 U.S. at 715 (O'Connor, J., concurring).

The relevance of the Equal Protection Clause to instances of religious discrimination has not gone unrecognized. In *McDaniel v. Paty*, for instance, Justice White in concurring in the judgment emphasized that Tennessee was prohibited by the Equal Protection Clause from discriminating against clergymen by barring them from holding public office. *See* 435 U.S. at 643-46 (White, J., concurring) (equal protection analysis is apposite because the right to seek elective office is fundamental). Similarly, in *Niemotko v. Maryland*, Justice Frankfurter recognized that burdening religious conduct, precisely *because it is religious*, constitutes an Equal Protection violation: "To allow expression of religious views by some and deny the same privilege to others merely because they or their views are unpopular, even deeply so, is a denial of equal protection of law forbidden by the Fourteenth Amendment." 340 U.S. at 284 (Frankfurter, J., concurring). In this case, Washington unapologetically revoked Mr. Davey's Promise Scholarship solely because he chose to study religion from the standpoint that comes most natural to him as a Christian "committed to living out [his] faith." JA 40. Washington thus invidiously classified him as "too religious" to be eligible for the generally available aid otherwise on offer. *Cf.* Wash. Rev. Code 28B.10.812 ("All student financial aid shall be granted…without regard to the applicant's race, creed, color, religion, sex or ancestry") (JA 133).

Washington protests, of course, that it holds nothing against religious *people* like Mr. Davey; it is only their religious *ideas* it disfavors. According to Washington, "Davey was *not* denied the scholarship because he identified himself as a Christian," Pet. Br. 11 (emphasis added); he was denied the scholarship because he wanted to study "theology" from a standpoint of faith. *See id.* at 7 (students

may not use the Promise Scholarship "to pursue a theology degree"). But this would-be distinction makes no difference. It was religious animus that initially drove Congress to force Washington's Blaine Amendment, Article I section 11, into the Washington Constitution. *Cf. Romer v. Evans*, 517 U.S. 620, 634 (1996) (laws born of "animosity toward the class of persons affected" cannot "constitute a legitimate governmental interest"). And a State's decision to accomplish invidious ends targeting a particular subgroup is never saved by claims that the State has accomplished the invidious ends via facially neutral means. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995) ("The Constitution 'nullifies sophisticated as well as simple-minded modes' of infringing on constitutional protections.") (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)); *Gomillion*, 364 U.S. at 342 (same); *see also Sherbert*, 374 U.S. at 405 (a State may not impose conditions on "even a gratuitous benefit" if to do so would "inevitably deter[] or discourage[] the exercise of First Amendment rights...and thereby threaten[] to produce a result which the State could not command directly") (internal quotations omitted). The *only* students who might wish to study religion from a standpoint of faith are those, like Mr. Davey, who already accept, or who might potentially come to accept, the validity of that worldview. That group of potential scholarship recipients is a discrete, identifiable, religiously defined subgroup of Washington citizens. Washington's restriction is thus perfectly tailored to burden *only* this discrete minority defined by religion.

More fundamentally, to accept at face value Washington's protestations that it disfavors religious *ideas*, not religious *people*, does nothing to save its discrimination from invalidity. The Court has given exacting scrutiny not

only to laws that discriminate based on suspect classes of citizens, but also to laws that burden fundamental rights. *See, e.g., Clark v. Jeter*, 486 U.S. 456, 461 (1988). Although fundamental rights analysis has often been applied most vigorously in the context of un-enumerated rights, *see, e.g., Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 672 (1966) (right to vote), the Court has also, on occasion, applied the fundamental rights prong of equal protection to enumerated rights, *see, e.g., Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972) (free speech). The right of citizens to be free from disabilities imposed solely because of their religious views is so deeply rooted in this Nation's history and traditions, that it deserves such heightened protection.

In any event, the Establishment Clause, quite apart from the Equal Protection Clause, also imposes an affirmative obligation on government to accord equal respect to the diverse religious convictions of its citizens. Just as government may not discharge government employees solely because of their partisan political preferences, *see Branti v. Finkel*, 445 U.S. 507 (1980), so too it may not take an official position on the debate between those who view religion "from a religious perspective" and those who do not. *See Rosenberger*, 515 U.S. at 830-31 ("It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint").

The Establishment Clause, and its proscription of *any* official governmental view on matters of religion, thus creates a bright-line, easily applied rule forbidding the government from adopting *any* views on matters of religious belief. *See Rosenberger*, 515 U.S. at 839. Unlike the context of freedom of thought and expression, where

viewpoint-based distinctions are sometimes thought acceptable (a public health campaign against drunk driving need not be coupled with a campaign extolling the coronary benefits of wine drinking), matters of religious belief, by definition, may not give rise to any sort of differential treatment. Instead, government simply may not "prefer one religion to another, or religion to irreligion." *Kiryas Joel*, 512 U.S. at 703.

In light of the above, Washington's pleas that it revoked Mr. Davey's scholarship based on a disfavor of *ideas*, not *persons*, is entirely beside the point. Washington could, of course, provide scholarships to encourage more students to become engineers, nurses, doctors, or journalists. If it did, Mr. Davey would have no complaint. *See Rust v. Sullivan*, 500 U.S. 173, 194 (1991); *Rosenberger*, 515 U.S. at 830 (distinguishing between content- and viewpoint-based discrimination). But as this Court has long-recognized, the fact that government need not pay for something in the first place does not mean that the Establishment Clause permits it to deny funding based on religious belief. *See Widmar*, 454 U.S. at 267-68; *Rosenberger*, 515 U.S. at 843. As the court below correctly reasoned, Washington had no duty to provide scholarship funding at all, but once it "decided to provide Promise Scholarships to all students who meet objective criteria, it had to make the financial benefit available on a viewpoint neutral basis." Pet. App. 19a. The nondiscrimination principle requires no less.

III. WASHINGTON HAS NOT ADVANCED ANY LEGITIMATE REASON FOR DISCRIMINATING ON THE BASIS OF RELIGION

Washington has no meaningful defense for its discriminatory regime. It instead seeks to side-step the Constitution, arguing, first, that Mr. Davey has no right to

have the state fund his religious studies and, second, that it is free to implement stricter separation of church and state than the Establishment Clause provides. For reasons set forth below, neither argument succeeds.

A. Washington Has No Constitutionally Protected Interest In Selectively Funding Certain Religious Views

Relying heavily on this Court's decisions in *Rust v. Sullivan*, 500 U.S. 173 (1991), *Regan v. Taxation Without Representation of Washington*, 461 U.S. 540 (1983), *Maher v. Roe*, 432 U.S. 464 (1977), and related cases, Washington first argues that it should have completely free rein to define the limits of its Promise Scholarship program. *See* Pet. Br. 23-31. In Washington's view, it may strip funds from scholarship recipients who choose to study religion from a faith-based perspective because the denial of funding does not stop those students from practicing any protected constitutional right.

This odd interpretation of the Establishment Clause has never won acceptance in First Amendment jurisprudence, and rightly so. At the outset, the cases relied on by Washington are readily distinguished; they all involve neutral restrictions on government funding either for private *conduct* or for *content*-defined (not viewpoint-defined) categories of non-religious expression. *See* Pet. Br. 23-24 (citing *United States v. American Library Ass'n*, 123 S. Ct. 2297 (2003); *Regan*, 461 U.S. 540 (1983); *Harris v. McRae*, 448 U.S. 297 (1980); *Maher*, 432 U.S. 464 (1977)). None involve viewpoint-based restrictions, much less viewpoint-based restrictions affecting religious issues, much less still viewpoint-based restrictions on the availability of individualized benefits. *See, e.g., Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541-43 (2001).

To be sure, the Court has identified a variety of individual rights to engage in private *conduct*—including, for instance, rights to choose abortion, engage in certain types of private sexual behavior, and live in nontraditional families. *See Roe v. Wade*, 410 U.S. 113 (1973); *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). Such un-enumerated rights have never been thought, however, to include corollary rights of public funding. Although women have a judicially created, limited right to choose abortion, *see Roe*, 410 U.S. at 155, they have no right to have the government pay for that abortion, *see Maher*, 432 U.S. at 469. So too, although the poor have a judicially recognized right to live in nontraditional family relationships, *see Moore*, 431 U.S. at 506, they have no right to government welfare programs that may help facilitate such relationships, *see Dandridge v. Williams*, 397 U.S. 471 (1970). More to the point, although the Court has held that citizens' free exercise rights extend to ritual animal slaughter, *see Lukumi*, 508 U.S. at 531, the celebrants have no right to government funding of the ceremonies at which the bloodletting occurs.

But these well-settled principles, which provide government flexibility to decide whether to fund constitutionally protected *conduct*, give way to other principles in contexts involving political freedoms of thought and speech, and religious freedom of conscience. In these contexts, the constitutional prohibition against viewpoint discrimination comes into play affirmatively to bar the government from taking official positions—for example, via differential funding rules—on core issues of politics or *any* issue of religion. *See, e.g., Rutan v. Republican Party of Ill.*, 497 U.S. 62, 72 (1990) ("even though a person has no 'right' to a valuable governmental benefit and even though the

government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely") (citations omitted). Washington makes much of the fact that *Regan* upheld against freedom of speech claims Congress's decision to extend a charitable tax subsidy to veterans' lobbying organizations but no other lobbying organizations. *See Regan*, 461 U.S. at 546-47. But that case would have been very different if, like Washington here, Congress had extended benefits to some but not others based on differences of religious viewpoint—for instance, if Congress had exempted from tax only groups composed of religiously committed veterans whose beliefs impelled them toward support for the military's policies disfavoring homosexual conduct by soldiers. *Cf. Taxation Without Representation v. Regan*, 676 F.2d 715 (D.C. Cir. 1982).

Of course, as Washington argues, Mr. Davey has no right to a scholarship at all, *see* Pet. Br. 23-24, and hence Washington's constitutionally fatal discrimination might indeed be remedied by eliminating Promise Scholarships altogether. But that decision, if ever it is to come, is for the Washington legislature. This Court's practice has been to eschew such scorched-earth, Shermanesque remedies in eliminating invidious discrimination. In *Speiser v. Randall*, on which Washington relies, the Court did not strike the challenged tax exemption altogether; instead, it eliminated the requirement that the exemption be conditioned on a veteran's willingness to take an oath of political orthodoxy. *See* 357 U.S. 513, 531-32 (1958). Similarly, in *Velazquez*, the Court's response to a discriminatory funding restriction, was not to enjoin the operation of the Legal Services Corporation, but to enjoin the *restrictions* placed on the viewpoints its lawyers could assert. *See* 531 U.S. at 549. So too here, the appropriate judicial response is not to eliminate

Promise Scholarships, but to enjoin Washington to award them on a viewpoint-neutral basis by expanding their permissible uses to encompass the study of *all*, not just some, of the religious views held by Washington citizens.

In sum, Washington's error "lies in focusing on the money that is undoubtedly expended by the government rather than on the nature of" the Promise Scholarship program. *Rosenberger*, 515 U.S. at 843. Although *Regan* upheld a *viewpoint-neutral* funding subsidy for lobbying on veterans' issues, there can be little doubt that the Court would have struck down *viewpoint-based* subsidies tied, for instance, to an organization's support for the government's party line on controversies like women's role in the military. *Cf. FCC v. League of Women Voters*, 468 U.S. 364 (1984). While necessarily enjoying wide latitude to define the limits to which it will or will not fund *conduct*, *see Rust*, 500 U.S. at 194, government may not make viewpoint-based funding decisions when it otherwise provides the funding on neutral, objective criteria. *See Velazquez*, 531 U.S. at 541; *Rosenberger*, 515 U.S. at 833. Indeed, Washington is ultimately forced to concede that restrictions, like the Promise Scholarship restriction, designed to "single out a particular idea for suppression because it [is] dangerous or disfavored" are constitutionally improper. Pet. Br. 30 (citing *Velasquez*, 531 U.S. at 541). That concession, standing alone, suffices to doom Washington's funding restriction.

B. Eliminating Washington's Discrimination Against Religion Would Provide More, Not Less, Separation Of Church And State

Washington argues that its discriminatory exclusion is justified by the State's strong policy of enforcing a strict separation of church and state. *See* Pet. Br. 31. But this argument profoundly misunderstands the relationship

between the Free Exercise and Establishment Clauses. Far from being in "internal tension," as a previous generation of this Court's precedents had wrongly assumed, *see Norwood v. Harrison*, 413 U.S. 455, 469 (1973), the two constitutional provisions constitute congruent facets of a unified regime of protecting religious liberty and freedom of conscience.

As the Court recognized in *Zelman*, in contexts of individualized benefits programs, the circuit between government and religion is broken where, as here, any aid to religion is the result of genuine, private choices. *See* 536 U.S. at 652. The *Zelman* Court made clear that "no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement." *Id.* at 655. Put simply, "[i]f the religious, irreligious, and areligious are all alike eligible for government aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government." *Mitchell*, 530 U.S. at 809.

As long as the circuit between government and religion is broken by genuine private choice, as it would be under a nondiscriminatory Promise Scholarship program, Washington can have no legitimate Establishment Clause interests in preventing funding from reaching the study of religion from the perspective of faith. *Cf. Good News Club*, 533 U.S. at 113 (a State cannot justify viewpoint discrimination based on a nonexistent interest in avoiding an Establishment Clause violation). Any such interest would be no more legitimate than a purported state interest in preventing citizens from using housing vouchers to relocate close to a place of worship; or preventing the use of food

stamps to buy food for sacramental meals; or preventing government employees from donating their government-paid salaries to a church, synagogue, or mosque. *Cf. Witters*, 474 U.S. at 486-87 (a State may issue a paycheck to an employee, "who may then donate all or part of that paycheck to a religious institution").

With no Establishment Clause interests whatever in preventing funding from being put to religious uses through genuinely private decisions, the predominant and only Establishment Clause value Washington has at stake is the principle of neutrality between religious beliefs. But whatever room there may be between the Establishment and Free Exercise Clauses, neither clause provides any "warrant for discriminating *against* religion." *Kiryas Joel*, 512 U.S. at 717 (O'Connor, J., concurring) (emphasis in original). The proper standpoint is "government impartiality, not animosity, toward religion." *Id.* at 718. Accordingly, going beyond what the Establishment Clause requires, Washington has failed to live up to what it minimally demands.

CONCLUSION

For these reasons, the decision below should be affirmed.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

GARY LOCKE,
Governor of the State of Washington, *et al.*,
Petitioners,

v.

JOSHUA DAVEY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, NORTH PARK THEOLOGICAL SEMINARY, THE WORLDWIDE CHURCH OF GOD, AND CLIFTON KIRKPATRICK, AS STATED CLERK OF THE PRESBYTERIAN CHURCH (U.S.A.) AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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IN THE
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GARY LOCKE,
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INTEREST OF AMICI CURIAE

The United States Conference of Catholic Bishops ("USCCB") is a nonprofit corporation, the members of which are the active Catholic Bishops in the United States.[1] USCCB advocates and promotes the pastoral teachings of the U.S. Catholic Bishops in such diverse areas of the nation's life as the free expression of ideas, fair employment and equal opportunity for the underprivileged, protection of the rights of parents and children, the sanctity of life, and the importance of education. Values of particular importance to the Conference are the protection of the First Amendment rights of religious organizations and their adherents, and the proper development of this Court's jurisprudence in that regard.

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[1]Pursuant to Supreme Court Rule 37.6, counsel for these amici state that they authored this brief, in whole, and that no person or entity other than the amici made a monetary contribution toward the preparation or submission of this brief. Both parties have consented to the filing of this brief. A letter of consent from respondent is on file with the Clerk of the Court, and a letter of consent from petitioners is filed herewith.

The Bishops of the United States have long recognized and supported quality education at all levels and the right of individuals to pursue the education of their choice free from governmental discrimination. For the State of Washington to deny a Promise Scholarship to respondent, who met all the neutral criteria to receive such an award, solely because he declared a major in Pastoral Ministries, clearly presents just such a case of governmental discrimination. The discriminatory decision of the State of Washington violated principles embedded in the Free Exercise, Equal Protection and Free Speech Clauses of the Constitution and was rightly overturned by the United States Court of Appeals for the Ninth Circuit.

The North Park Theological Seminary is the sole seminary sponsored by, and training clergy for, the Evangelical Covenant Church, a Protestant religious denomination. It has an interest in the theological training and the training of Evangelical Covenant Church clergy for ministry in denominational and parachurch ministries. North Park Theological Seminary appears as an amicus herein to urge the Court to protect the First Amendment rights of religious organizations and persons motivated by religious beliefs in Washington State and elsewhere, and to affirm the right of religious adherents to participate in government benefit programs without suffering discrimination in the administration of those programs.

The Worldwide Church of God, a California corporation, began in the early 1930's in Eugene, Oregon. Subsequently it was incorporated in California in 1947 where it maintains its worldwide headquarters. The Church has congregations throughout the United States and affiliate churches in many foreign countries. The Church sponsors Ambassador College, a collegiate, seminary, distant learning program, and, hence, the Church has a material interest in issues pertaining to financial aid.

Clifton Kirkpatrick, as Stated Clerk of the General Assembly, is the senior continuing officer of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is a national Christian denomination with nearly 2.5 million members in more than 11,500 congregations, organized into 173 presbyteries under the jurisdiction

of 16 synods. Through its antecedent religious bodies, it has existed as an organized religious denomination within the current boundaries of the United States since 1706.

This brief is consistent with the policies adopted by the General Assembly regarding the religious liberty guarantees of the "First Amendment". The 200th General Assembly of the Presbyterian Church (U.S.A.) expressly addressed these issues:

> Government payments on behalf of individuals, under programs such as . . . scholarship assistance, should without exception be available to . . . students at church sponsored agencies and institutions on exactly the same terms as if those . . . [students] were receiving their services from secular agencies. . . . Government must be neutral in matters of religion.

Presbyterian Church (U.S.A.), God Alone Is Lord of the Conscience, A Policy Statement Adopted by the General Assembly 42-43 (1988). The General Assembly does not claim to speak for all Presbyterians, nor are its decisions binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of respect and prayerful consideration of all the denomination's members.

SUMMARY OF ARGUMENT

A government may not target religion for adverse discriminatory treatment, and government may not deny or condition the receipt of a benefit or privilege provided by the state to an individual, in a way that infringes upon an individual's religious liberty. These keystone principles of our legal system are effected, in different ways, through the Free Exercise, Equal Protection and Free Speech Clauses of the federal Constitution. By offering the state Promise Scholarship program to everyone except individuals who pursue degrees in theology, the State has intentionally violated these constitutional principles.

The case before this Court does not, as petitioners and their amici feign to believe, implicate whether the State can be required affirmatively to fund the exercise of Davey's personal religious rights. The State, for example, could have decided legitimately to give awards only to those pursuing degrees in science and technology, and respondent would have had no legitimate legal claim that Washington had to provide him an award to study for the ministry. But Washington did not do this. It instituted a broad-based program to help deserving high school students; it gave financial awards to every student in Washington who came from a low to moderate income background, had done particularly well in high school and wanted to attend accredited Washington colleges. Those awards could be used for any education-related expenses. The State's exclusion of all those who pursued a degree in theology from eligibility for Promise awards is illegitimate. It is a species of particularized, person-specific legal disability which violates Free Exercise principles because it discriminates only against religious conduct, violates Equal Protection principles because it imposes a governmental classification keyed solely to religion, and violates Free Speech principles because it imposes purely viewpoint-based eligibility rules.

This case provides an opportunity to lay to rest the suggestion, implicit in the Washington Constitution and Wash. Rev. Code §28B.10.814, that state governments are allowed to violate federal constitutional rights and implement a policy of hostility to religiously motivated persons. The Framers of our federal Constitution would have found this idea an anathema. Both James Madison and Thomas Jefferson, while holding differing views in other First Amendment areas, joined in their "strong stances against a differential scope of rights based on religion," Mark Edward DeForest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J.L. and Pub. Pol'y 551, 615 (2003), and a differential scope of rights is what the State of Washington has enshrined as law. The government's simple "obligation of neutrality in the face of religious differences," *Thomas v. Review Board of Indiana Employment Sec.*, 450 U.S. 707, 719-20 (1981), means that this sort of rank governmental discrimination must be rejected finally and for good.

ARGUMENT

This Court must hold, on the facts of this case, that religious discrimination in the grant of otherwise broadly available state benefits violates the Constitution. The State of Washington has imposed an eligibility restriction on state-sponsored financial aid which prohibits the award of all such aid, specifically including the Promise Scholarships at particular issue here, to any person, who is otherwise qualified, who would study theology. Washington's invidious discrimination violates this Court's jurisprudence in regard to Free Exercise, Equal Protection and Free Speech.

The proper resolution of this case, affirming the decision of the Ninth Circuit, does not require a decision that the State of Washington has any independent or freestanding constitutional obligation to fund the college careers of promising high school seniors. What the State of Washington is obligated to do is act with simple fairness towards applicants and not discriminate invidiously between them based on their religious beliefs and the extent to which they practice those beliefs.

The instant case deals only with whether Mr. Davey may be disqualified from a state scholarship program because he has declared a major in theology. The rules at issue do not restrict eligibility by reference to the sort of institution that students who ultimately receive the funds may attend, except that they must be in Washington and accredited. The program does not restrict the use, whether for religious purposes or not, that can be made of the funds after they pass into the recipients' hands. The choice of which education-related expenses the award will be used to pay for is made by individual students. The funds may be used for any education-related expenses as directed by the student and so may ultimately all flow to a software company, a pizza parlor, an apartment complex or a college or university in Washington State. The program is not restricted to studies in any particular academic area, like nursing or physics. The only curriculum-related disqualification is that persons declaring a major in theology are not eligible for the award.

The "theology" disqualification appears in a state statute, "[n]o aid shall be awarded to any student who is pursuing a degree in theology." Wash Rev. Code §28B.10.814. This statute applies the state constitutional barrier to the appropriation or application of "public money [to] religious . . . instruction." Wash. Const. Article 1, §11. State case law, and the Attorney General's brief, make clear the disqualification is for "religious instruction" rather than "instruction in religion." Brief of Petitioners at 5-6, 22-23. It is a content-based restriction, disfavoring those who study religion for the religion's own sake. This disqualification is not only a classification based on religion (versus nonreligion), but a classification among religious studies. The State has decided that theology (however labeled by the school) is always a religious exercise akin to worship. *See Calvary Bible Presbyterian Church v. Board of Regents*, 72 Wash. 2d 912, 919 (1967). In other words, those serious about their religious studies (as presumed by the State) need not apply. On the facts of this case, that result may not be sustained.

I. The Promise Scholarship Program Imposes a Discriminatory Classification Based on Religion.

A. Free Exercise Principles

"At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or prohibits conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 531-32 (1993). More specifically, "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral . . . and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Id.* at 533 (citations omitted). Both the text of a law, and its effect in practice, are to be examined in determining whether "impermissible targeting" of religion is taking place. Here, as in *Lukumi*, "almost the only conduct subject to [the language of the rules in question] is the religious conduct" of the person challenging them. *Id.* at 535. In fact, by its own language, it is only inherently religious conduct that could be subject to the prohibition on "pursuing a degree in theology," since those engaged in the study of religions as a purely

academic pursuit are not prohibited by Washington's law from receiving Promise awards, and indeed many such courses are taught in Washington State colleges. J.A. 65-74.

The Promise Scholarship program provides funds to those who participate in the secular study of religion as well as all other disciplines, and only makes ineligible those who are pursuing "religious instruction" defined as the study of theology.[2] *See, e.g.*, Brief of Petitioners, at 5, 6, 10, 11. In fact, the effect of the rule on Mr. Davey was that he recognized that the Fromise program presented him with a choice between his own beliefs and receipt of the award.[3] The Promise program was understood by school officials to draw distinctions based on "faith-based criteria". J.A. 158. The "effect of this law in its real operation", *Lukumi*, 508 U.S. at 535, is clearly to target religion impermissibly.

Similarly *McDaniel v. Paty*, 435 U.S. 618 (1978), holds that religious persons may not be disqualified from public programs or benefits solely on that basis. In *McDaniel*, the State of Tennessee acknowledged that adults generally could seek and hold office as delegates to state constitutional conventions, just as Washington acknowledges that high achieving students of modest incomes attending Washington colleges generally are entitled to Promise Scholarships.

> Yet under the clergy-disqualification provision, McDaniel cannot exercise both rights simultaneously

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[2]The disqualification sweeps more broadly, disqualifying all theology majors for receipt of the award regardless of whether those students plan to enter the ministry (plainly to advance religion) or not.

[3]This choice is a result of the fact that Davey was deemed to have been "pursuing a degree in theology" because he declared a major in Pastoral Ministry. Absent the strong religious motivation that led him to declare that major, and so led to the consequent conclusion that Davey fit the rubric "pursuing a degree in theology," a Promise award would have been forthcoming no matter what courses Davey was taking at Northwest College ("Northwest") or how he intended to pay for them. The overinclusiveness and underinclusiveness of this rule show that it also could not pass even rational basis scrutiny.

> because the State has conditioned the exercise of one on the surrender of the other. Or, in James Madison's words, the State is "punishing a religious profession with the privation of a civil right." . . . . In so doing, Tennessee has encroached upon McDaniel's right to the free exercise of religion. "[T]o condition the availability of benefits [including access to the ballot] upon this appellant's willingness to violate a cardinal principle of [his] religious faith [by surrendering his religiously impelled ministry] effectively penalizes the free exercise of [his] constitutional liberties." *Sherbert v. Verner*, 374 U.S. 398, 406 . . . (1963).

McDaniel, 435 U.S. at 626. The line drawn by the Court in *McDaniel* is equally applicable here.

It is no answer to suggest, as the State does, that Davey need not give up the actual substance of his religious beliefs themselves in order to receive a Promise award. Brief of Petitioner, at 12, 23-31. That is, it is true that he need not convert to another religion or renounce his own in order to be eligible. But *McDaniel* focuses explicitly on the "exercise" of rights, 435 U.S. at 626, not simply on their existence in a vacuum. "The Free Exercise Clause 'protects religious observers against unequal treatment.'" *Lukumi*, 508 U.S. at 542, quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 148 (1987). Davey cannot exercise his conceded right to decide to pursue a degree in Pastoral Ministry without losing the award to which he is otherwise entitled.

The genuine significance of *Lukumi* and *McDaniel* is to be found, not in the specifics of the opinions, but in the underlying values that are common to them, the reasons they were decided as they were. To target religion for adverse, discriminatory treatment either as "a religion" (as in *Lukumi*) or as an individual religious practice or status (as in *McDaniel*), or both (as here), is constitutionally impermissible except for the gravest of reasons. That religion generally is here targeted for discriminatory treatment is manifest from the fact that the state draws invidious governmental distinctions between learning about religion from an academic perspective, which is no barrier to

receipt of a Promise award, J.A. 65-74, and learning about religion from a "faith-based" perspective, which disqualifies one from the Promise program, J.A. 158. Indeed, those pursuing a degree in theology from a faith-based perspective are thereby disqualified from receiving all forms of state educational aid, not simply a Promise Scholarship. J.A. 45, 61.

The claim that such a law could possibly be religiously neutral and generally applicable is incredible on its face, because the only nonacademic and nonincome related standard contained in the eligibility requirements of the program is that the student cannot be "pursuing a degree in theology." *Davey v. Locke*, 299 F.3d 748, 751, 753 (9th Cir. 2002). This negative sanction, which is applied only against those persons who study religion as religious instruction, is unquestionably not religiously neutral, nor can it be viewed as generally applicable because it identifies only students studying religion for religious reasons for state disapproval. That is a religious classification.

Davey could have studied precisely the same religion courses, at the same school, with the same professors, and have received the Promise award. But his simple declaration of a major which fits the "degree in theology" standard described by the State, motivated by his desire to study from a faith-based perspective and enter the ministry, resulted in the loss of the scholarship. That is a religious classification within a religious classification.

The question of "how much" interference with the free exercise of religion is constitutionally "too much" is implicitly raised throughout briefing, by and in support of petitioners here. As the Ninth Circuit put it, the State "distinguishes *McDaniel* on the footing that McDaniel was prohibited from being a delegate as a result of being a minister, whereas Wash. Rev. Code §28B.10.814 does not prohibit Davey from pursuing a degree in theology." *Davey*, 299 F.3d at 754. This draconian standard suggested by petitioners, that one must be "forced to forgo his religious calling" before the Free Exercise clause is implicated, *Davey*, 299 F.3d at 754, misstates the law.

"[I]t is too late in the day to doubt that the libert[y] of religion . . . may be infringed by the denial of or placing conditions upon a benefit or privilege" accorded by the state. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). These words from Justice Brennan capsulate the thesis of the instant brief. Joshua Davey may have had – apart from the Washington State Promise program – no freestanding legal right to receive state support for his college studies, and Washington may not have statutorily required Davey to forgo his religious calling, but the State has clearly abridged his freedom of religion by placing conditions upon and ultimately denying him the benefits of a broadly available scholarship program the State had created for all high performing, moderate income students from the State who wanted to attend college in Washington.

B. Equal Protection Principles

The same principle, that government may not penalize or discriminate against individuals because they are observing or exercising their religious beliefs, is also protected by way of the Equal Protection Clause. Chief Justice Burger in *Meek v. Pittenger* recognized this linkage when he wrote, "One can only hope that, at some future date, the Court will come to a more enlightened and tolerant view of the First Amendments's guarantee of free exercise of religion, thus eliminating the denial of equal protection" inherent in prohibiting children from receiving tax-supported remedial programs in religious schools, but making those benefits available to those who went to nonreligious schools. 421 U.S. 387, 439 (1975) (Burger, C.J., concurring in judgment in part and dissenting in part). "Affluent parents . . . will be able to cope with this denial of equal protection, which is, for me, a gross violation of Fourteenth Amendment rights, but all others will be forced to make a choice" between their religious needs and their need for the financial benefits the government program offers. *Id.* This is exactly the quandary that enforcement of the Washington eligibility standards creates here. It forces students to choose between a state sponsored program from which they are entitled to benefit, and pursuing honestly and openly their own vocations.

The essence of the Equal Protection Clause is the "command[] that no State shall 'deny any person within its jurisdiction the equal protection of the laws.' " *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). Classifications among citizens may proceed on any number of bases. Religion, however, is itself a prohibited basis for governmental classifications, one that leads to strict scrutiny review. *Employment Div. v. Smith*, 494 U.S. 872, 882 (1990). Religion is an "inherently suspect classification." *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1970); *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F.Supp.2d 961 (N.D. Ill. 2003). When the basis for the classification is to disfavor the exercise of a constitutionally protected right, then Equal Protection guarantees have been transgressed. "If a law has no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional." *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969).

The classification by which the State of Washington decided to disfavor those in Davey's position is clearly religious in at least two ways. On the face of the eligibility criteria and Wash. Rev. Code §28B.10.814, the State targets "theology" and "religious worship," by name, for adverse treatment. The record below demonstrates clearly that the way in which these terms are defined in practice is to penalize those whose study of religion has a faith-based motivation. These eligibility restrictions discriminate based on religion between those who study for a degree in theology, and those who either pursue any other degree for any reason whatsoever, those who study religion less seriously (*i.e.* who do not declare a major in theology but may take the same classes), those who study religion seriously but avoid declaring a theology major, or those who pursue the study of religion from an academic and historical perspective. Indeed, many of the courses taught at Washington State University qualify as studies of theology by name or description. J.A. 67-74. It is only respondent's personal choice to pursue Pastoral Ministry at Northwest that caused the State to disqualify him for the Promise award he would otherwise have received. In so classifying by religion (or perhaps by "religion more actively practiced"), the State has impinged on personal rights particularly protected by the Equal Protection Clause.

C. Free Speech Principles

In *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819 (1995), this Court held that religious discrimination by an arm of the state, based on the degree and nature of religiosity of one's speech, violated the Free Speech Clause. As in *Rosenberger*, the funding distinction drawn by the State here is "invidious" and is drawn to "ai[m] at the suppression of dangerous ideas," *Rosenberger*, 515 U.S. at 834 (citations and internal quotation marks omitted), because it is aimed at religion. *Rosenberger* requires that when the government makes benefits available, it must be on a religion-neutral basis.

This Court's decision in *National Endowment for Arts v. Finley*, 524 U.S. 569 (1998), reinforces the application of *Rosenberger* to this case. The Court in *Finley* decided that the legislative requirement to take "decency and respect for the . . . beliefs and values of the American public" into account in making arts funding decisions, as part of a broader "excellence" standard, did not facially violate constitutional Free Speech standards. *Finley*, 524 U.S. at 576, 586.[4] But in doing so it emphasized that *Rosenberger* struck down the viewpoint-based restrictions at issue there, in part because the funding was otherwise available to <u>all</u> student organizations that were related to educational programs. *Finley*, 524 U.S. at 586. Promise awards, by analogy, are available to all otherwise eligible students to use for educational purposes. *Finley* also distinguished programs involving "comparably objective decisions on allocating public benefits". *Id.* The Promise program, of course, uses purely objective standards in awarding aid, specifically the students' rank in class, whether family income exceeds 135% of the state's median family income, and the geographic location and accreditation status of the college in question. J.A. 50-51.

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[4]The decision in *Finley* would certainly have been different if the Court had been reviewing a program in which Congress had directed NEA to fund all arts projects proposed by skilled artists of low to moderate income, but had then directed NEA to exclude from eligibility, for <u>all</u> NEA grants, all artists working from a faith-based perspective.

In *Rosenberger*, the University of Virginia funded certain expenses of a number of student publications, defined as those that published "student news, information, opinion, entertainment, or academic communications media groups." *Rosenberger*, 515 U.S. at 824. But the University had denied funding for one particular student publication that wrote from an evangelical Christian perspective, even though the scope of the funding program clearly covered the expenses of the publication in question, *Rosenberger*, 515 U.S. at 825-26, and other student publications writing on religious issues were funded. *Rosenberger*, 515 U.S. at 850 (O'Connor, J., concurring). This Court held that the First Amendment prohibited such discrimination against the organization when it sought financial aid generally available to other student groups, where its funding request otherwise came within the scope of the program at issue. *Rosenberger*, 515 U.S. at 837. This sort of viewpoint discrimination was proscribed by the University's obligation to administer its programs without discriminating on the basis of religion. *Id.* at 829. The University had drawn the line and disqualified Rosenberger's publication because his publication actively promoted religion as religion. In other words, it took its religious practices seriously. That form of content-based classification infringed the Free Speech Clause. To the same effect, albeit in a different context, is *Legal Services Corp. v. Velasquez*, 531 U.S. 533 (2001). The same sort of viewpoint-based disqualification is operative here. In Washington, a student receiving a Promise award can study religion on any basis – except as truth.

II. The Religious Classification Lacks a Compelling Justification.

Washington attempts to justify its discriminatory exclusion of theology degree candidates from the Promise award program on several grounds. It denies the violation of law but justifies the burden on religion by pointing to cases that reject attempts to force government to fund the exercise of some right. The State strongly suggests it has every right to condition the use of its funds on the promotion of its public policy and, implicitly, that that public policy may legitimately be anti-religious. In the end the State argues that its scholarship program avoids the advancement of religion contrary to

state and federal constitutional law. Indeed, it is argued that this state law actually protects religious liberty. Brief of Petitioners, at 5-6; Brief Amicus Curiae of Historians and Law Scholars on Behalf of Petitioners Gary Locke, *et al.*, at 30. Whatever merit these arguments might have in a vacuum, they do not rise to the compelling justification required to legitimize the violation of Mr. Davey's rights.

A. Arguments from Case Law

The State and its amici rely on the line of cases known as the "Sunday Closing Cases" for the proposition that a financial burden on a person who exercises his religion is insufficient to upset a governmental decision. In *McGowan v. Maryland*, 366 U.S. 420 (1961), *Two Guys from Harrison-Allentown v. McGinley*, 366 U.S. 582 (1961), *Gallagher v. Crown Kosher Super Market of Mass.*, 366 U.S. 617 (1961), and *Braunfeld v. Brown*, 366 U.S. 603 (1961), this Court considered and rejected challenges to a number of so-called Sunday Closing laws, brought on a variety of different constitutional theories.

In *McGowan*, the Court sustained a closing law in the face of Equal Protection, Due Process and Establishment Clause challenges. It found a legitimate basis for the distinctions drawn between items permitted to be sold on Sunday and those not, and found that while 1800's-era Sunday closing laws were motivated in part by religious reasons, there were sound contemporary secular reasons for setting aside Sunday as a day when stores generally would be closed, including the need for rest and recreation, and improvements to health and the public safety. *McGowan*, 366 U.S. at 428, 431-34, 436-42. The Court rejected the Free Exercise challenge to the law because claimants alleged only an economic injury and made no claims related to infringement on their religious beliefs, and adduced no proof of what those religious beliefs, if any, were. *Id.* at 429. To the same effect were *Gallagher*, 366 U.S. at 622-27, 630-31, and *Braunfeld*, 366 U.S. at 602-05. In *Two Guys*, the Court rejected both the Establishment Clause and Equal Protection claims the plaintiff raised, because the statutes had no governmental purpose, or any effect, of promoting religion, and did not classify in any identifiable way that

treated plaintiffs differently from any other citizen. *Two Guys*, 366 U.S. at 590-92, 598.

These cases are inapposite to the issues here – indeed, they undercut seriously the basic Free Exercise argument Washington advances, the superficially attractive claim that the State has not prevented Davey from practicing his religion, even if it has made it more expensive for him to do so. Brief of Petitioners at 12, 21-23, 31-33, 36. First, there was no showing in any of the Sunday Closing Cases of a legislative intent to affirmatively disfavor any individual or group on account of his religion or his practice of it, for example, an intention to injure the interests of observant kosher market owners in *Gallagher* or *Braunfeld*. But as Wash. Rev. Code §28B.10.814 and the State's eligibility criteria demonstrate on their face, they intentionally disfavor those who would major in theology, and operate to the greatest disservice of those who take their religious beliefs most seriously.

Second, in none of these cases does it appear that the government, by imposing its rules or classifications, had deprived plaintiffs, by reason of their religious beliefs or practices, of an affirmative governmental benefit to which they would otherwise have been entitled. But in the instant case Davey lost a significant governmental benefit simply because of his religious motivation for declaring a particular major, which constituted the pursuit of a "degree in theology." Third, in each of these cases the Court found significant and purely secular health, recreation, and safety reasons for the present-day enforcement of the closing laws. In contrast, Washington has enunciated no good reason to have singled out the vigorous religious observer and targeted him for adverse governmental treatment. The government of the State of Washington has no legitimate interest in making sure fewer people receive degrees in theology, or that they have greater financial difficulties paying for college than their peers do who are majoring in other disciplines.

The Sunday Closing Cases would have resulted in dramatically different opinions if, for example in *Braunfeld* or *Gallagher*, the State had provided all grocers and butchers a significant governmental tax benefit, but had then passed legislation

providing that grocers or butchers who did not operate on Saturdays for religious reasons were not entitled to those benefits and in addition were not entitled to any other business-related tax benefits, just as Davey, because he was "pursuing a degree in theology," was ineligible not just for the Promise Scholarship but also for all other forms of governmental student aid. J.A. 45, 61.

For the same reasons, reliance on challenges to governmental decisions not to fund religious education or private school transportation are inapposite. In no case was the claimant denied a benefit solely and exclusively because of religion. In *Brusca v. Missouri*, 332 F.Supp. 275 (E.D. Mo.) (three judge court), *summ. aff'd*, 405 U.S. 1050 (1972), parents claimed unequal treatment and religious discrimination because the state funded public education, not religious schools. The court recognized the State's obligation was only to provide a free public education, noting "as no invidious discrimination exists, the courts may not interfere." 332 F.Supp. at 279. The parents chose a non-public education for their children as was their right. No nonpublic education was funded at taxpayers' expense. In contrast, eligible students pursuing all post-secondary education in Washington may receive Promise awards – except those majoring in theology studies. As described above, the failure to include theology in the circumstances of this case is discriminatory.[5]

Petitioners rely on *Norwood v. Harrison*, 413 U.S. 455 (1973), for the same proposition. *Norwood* only holds that a State might constitutionally not provide any assistance to any private school

[5]In much same way, *Leutkemeyer v. Kaufman*, 364 F.Supp. 376 (W.D. Mo.) (three judge court), *aff'd*, 419 U.S. 888 (1974), also deals with a different question from the one posed here; the government there took the position that state-funded bus transportation could not be provided to any students attending nonpublic schools. *Leutkemeyer*, 364 F.Supp. at 379. This position was based on a state constitutional provision that said state education funds were to be used only for the support of public education. *Id.* Thus, the District Court's decision in favor of the state in *Leutkemeyer* means only that states can decide not to fund any private education at all. The government's position did not turn upon a religious/nonreligious distinction, but on a private/public distinction, and the District Court did not decide that the State could discriminate on the basis of religion in the implementation of one of its existing programs.

without necessarily violating the Free Exercise Clause. *Id.* at 462. This case is no support for a State's religiously discriminatory actions in regard to scholarship aid for students. Indeed, this Court noted that states may not act "without regard to constitutionally mandated standards forbidding state-supported discrimination." *Id.* at 463. The "values inherent in the Free Exercise Clause" are entitled to positive constitutional protection that private racial bias is not. *Id.* at 469-70.

B. Funding Conditions

The State cites, in particular, *Regan v. Taxation with Representation*, 461 U.S. 540 (1983), and *Rust v. Sullivan*, 500 U.S. 173 (1991), for the unremarkable but inapposite conclusion that, when a state institutes a particular social program, it does not have the obligation to fund all other, including religiously-based, alternative viewpoints to that program. In particular, Washington need not fund the exercise of even fundamental rights. We agree. But when the State engages in discrimination, these cases do not provide shelter. Indeed, they point the other way.

In *Regan*, the Court approved a distinction among organizations doing lobbying, which had the effect of making some tax exempt, and some not. That groups, like Taxation With Representation, would be exercising free speech rights in doing lobbying, did not mean that the government's actions were constitutionally suspect or required the application of strict scrutiny in the face of an Equal Protection challenge. 461 U.S. at 549. But that case did not involve discrimination against religion. *Id.* at 547. Indeed, one line the Court drew was that

> [t]his case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to ai[m] at the suppresion of dangerous ideas. . . . But the veteran's organizations that qualify under §501(c)(19) are entitled to receive tax deductible contributions regardless of the content of the speech they may use . . . . We find no indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect. The

> sections of the Internal Revenue Code here at issue do not employ any suspect classification. The distinction between veterans' organizations and other charitable organizations is not at all like distinctions based on race or national origin.

Regan, 461 U.S. at 548 (internal quotation marks omitted). This, of course, is the point. Washington's eligibility requirements do discriminate invidiously against persons holding specific religious positions, its benefits are not available "regardless of the contents" of those views, and religion is very much a suspect classification like race and national origin.[6] Further, the State cannot deprive Davey of a benefit that would otherwise be available to him because his usage of that benefit would be done from a "prohibited perspective." *Rosenberger*, 515 U.S. at 834.

Rust v. Sullivan, *supra*, upheld the federal government's prohibition against Title X grantees conducting abortion counseling or referrals when acting as part of a federal family planning program. Because the program in *Rust* was about contraception, abortion referral and counseling was, by definition, outside its scope. The program did not discriminate in terms of eligibility for its benefits, and certainly not on a religious basis. No religion or viewpoint based distinctions were drawn in determining whether the services funded by the program would be made available to individuals who wanted them. *Rust*, 500 U.S. at 193. There is nothing in the *Rust* opinion that would suggest the benefits of that or any other government program could be denied to one otherwise eligible for them because of the way that person exercised a fundamental constitutional right.

As the *Rust* Court said, "we have here not the case of a general law singling out a disfavored group on the basis of . . . content, but of the Government refusing to fund activities . . . which

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[6]The Court in *Regan* also noted that Congress could rationally decide to accord veterans' groups special protections, in view of veterans' service to the country. *Regan*, 461 U.S. at 551. Governments cannot, consistent with the Religion Clauses, rationally decide to benefit all eligible scholarship applicants except those with religious motivations for their studies.

are specifically excluded from the scope of the project funded." *Id.* at 194. This is a far cry from the intentional religious discrimination effected by withdrawal of an award which was specifically included in the scope of the project the State had funded, to assist high performing, moderate income students attend college in Washington. J.A. 50-51, 53.[7]

Thus, only if evaluated in both a legal and factual vacuum does petitioners' position have merit. It may be true that if it were not for his qualifications for the Promise program, Mr. Davey might have no freestanding, independent right to have the State provide him with money that he could decide to dedicate to any education-related expenses. *Davey*, 299 F.3d at 751. He does, however, have the right, having fulfilled the requirements of that program by virtue of class rank, family income, residence, and location and type of institution he intended to attend, not to have that benefit revoked because he had the "wrong" subjective religious motives for pursuing his studies, and had declared a major in Pastoral Ministry. A government may not restrict

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[7]Both *Harris v. McRae*, 448 U.S. 297 (1980), and *Maher v. Roe*, 432 U.S. 464 (1977), are fully consistent with this position. Neither suggests that a person otherwise eligible for services under a government benefit program can legitimately be excluded from receiving those benefits due to intentional religious discrimination on the government's part. Neither supports the idea that the government may discriminate by religion in deciding how its public benefits may be administered. They stand only for the related but not coincident point that the government may generally decide in the first instance what programs to fund. There is no inconsistency with Davey's position here.

The Court in *Harris* was at pains to point out that if the government had made women who obtained abortions ineligible for "all Medicaid benefits" for which they otherwise qualified, then this would probably be unconstitutional. *Harris*, 448 U.S. at 317, n.19. By analogy this is what the State of Washington did here. Its discriminatory religious standard denied Davey all the benefits of the Promise program, and indeed all state financial aid. 1 A. 61.

Still less was there any claim in *Harris* or *Maher* that the benefits the Medicaid program did provide to these low income women were being withheld from them because of their religious beliefs or exercise. In *Harris* and *Maher* the government decisions were not predicated on a constitutionally suspect classification – low income women pursuing abortions are not a suspect class for purposes of the Court's equal protection analysis. *Harris*, 448 U.S. at 323, citing *Maher*, 432 U.S. at 470-71. Religion, however, clearly is a suspect classification. *City of New Orleans v. Duke*, 427 U.S. 297 (1970); *Torcaso v. Watkins*, 367 U.S. 488 (1961).

a constitutionally-protected right, even by merely withholding a benefit. *Speiser v. Randall*, 357 U.S. 513, 526 (1958); *Planned Parenthood of Cent. and N. Ariz. v. Arizona*, 718 F.2d 938 (9th Cir. 1983), *citing Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

More than 20 years ago, this Court invalidated a state policy that discriminated against student religious organizations by barring them from using a public university's facilities. *Widmar v. Vincent*, 454 U.S. 263 (1981). The state had decided that all student groups generally would be given the benefit of access to such facilities, excluding only religious groups. Even where there clearly was no argument that any student group, let alone a student religious group (by virtue of its religiosity) had an independent right to use these facilities, when they had been made broadly available, the state could not constitutionally discriminate against those who wished to use those same benefits for religious reasons. *Widmar*, 454 U.S. at 267-70.

C. Advancement of Religion

Washington points to a desire to avoid taxpayer support for religion through public funding, avoiding establishment of an official church, and avoiding entanglement of government with religion. Brief of Petitioners at 35, 40-41. Avoidance of governmentally compelled support for religion contrary to a taxpayers' own religious views and avoidance of governmentally established churches are legitimate values, but they are scarcely threatened by awarding Promise Scholarships in a religiously nondiscriminatory manner. It is established law that taxpayers are not being unconstitutionally compelled to support religion when taxpayer funds are administered by the government to benefit a broadly available social program with secular goals under which benefits may flow to religious organizations only as the result of private choice.

The only "support for religion" that could possibly arise from an award here would be as a result of the entirely personal and private decision of an individual – not a government or its arm – to use neutral state benefits to pay for certain courses. But that decision is not in any sense the state government's.

In *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), this Court held clearly that the federal Establishment Clause did not prohibit a state from providing special education funds to an individual with a visual disability who sought to use those funds to obtain a religious education. Any aid that ultimately flowed to the religious institution did so only as a result of a genuinely independent and private choice by the recipient of the aid. *Witters*, 474 U.S. at 487. The aid was generally available to qualified individuals without regard to the affiliation of the schools attended. *Id.* at 487-88. The program created no incentive or greater benefit for individuals to seek a religious education. *Id.* at 488. Finally, and significantly, the decision where to use the funds was not attributable to the state. *Id.* at 489. Thus, the critical factor in *Witters* was that the individual, not the state, made the decision where to apply a neutrally available public benefit. All of these factors are present here. Accord *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

The Promise program would fulfill all of these requirements were it not for the religious discrimination provision that infects it. The program provides that a "warrant," the equivalent of a check, goes to all Promise Scholarship recipients individually. J.A. 7, 27. These payments are channeled through college aid offices only to confirm that the student has registered and is pursuing the requisite amount of course work. J.A. 27. All the benefits flow directly to the student, who receives all the funds represented by the "warrant" and can use it to pay for any education related expense, including room, board, tuition, books, supplies, computer software, food and lodging expenses and even field trips. J.A. 57-58, 153-54. The college cannot deduct or withhold funds from the scholarships for any reason, and no part of the scholarship is payable to the school directly. J.A. 57-58, 184. Obviously, if the individual recipient decides to use these funds to pay for classes needed to pursue a degree in theology the State is taking no part in that decision. There is no Establishment Clause risk to be apprehended here, and no compelling interest in avoiding its violation on the government's part has been demonstrated.

Any "excessive entanglement" of government with religion, *Lemon v. Kurtzman*, 403 U.S. 602 (1971), is also to be avoided. Absent the theology exclusion, the grant of a Promise award does not

entangle the State in religion at all. Indeed, granting Promise awards without any inquiry into the religious nature of, or motivation for, studies is self-evidently more likely to avoid entanglement than will the State's policing of religion-focused eligibility standards.[8] This is constitutionally offensive; if there is entanglement to be seen here, it is in the State's enforcement of its antireligious restrictions, not in a grant of a scholarship. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979) (government "may impinge on rights guaranteed by the Religion Clauses" by the "very process of inquiry" into them).

Washington also asserts a state interest in treating secular and religious instruction differently in order to avoid the "official advancement" of religion, thus raising the possibility of federal Establishment Clause concerns if it does not so discriminate. Brief of Petitioners at 40-41. Whatever merit such a federal claim might have had,[9] the fact is that there is absolutely no federal Establishment Clause risk to be apprehended here. Under *Zelman*, *supra*, the payment of a Promise award to Davey is clearly constitutional under the Establishment Clause.

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[8]In fact, the course of this litigation demonstrates that it is the State, in applying the "no theology" requirement and in defending its position below, that has intentionally entangled itself in religion. The State has intruded itself deeply and unnecessarily into religious issues, witness the State-required certifications, J.A. 45, the State's charge to colleges to decide the religious nature of majors being pursued, J.A. 45-46, 60-61, 86, and the State-imposed Conditions of Award, J.A. 92. At deposition, the State inquired into the effects on Davey's own spiritual development of the revocation of the scholarship, and the reasons why Davey wanted to study for the ministry, J.A. 101-109, Davey's perception of the different views of Biblical teaching offered by different colleges, J.A. 106-10, and even inquired into the nature of Pentecostal doctrine and Davey's own personal religious practices. J.A. 111-13. This also drags State officials into the quagmire of defining "theology" and other religious concepts. J.A. 124-26.

[9]The three cases emphasized by petitioners as support for this notion are seriously off point. *McCollum v. Board of Education*, 333 U.S. 203 (1948), *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), and *Stone v. Graham*, 449 U.S. 39 (1980), share one crucial characteristic. All dealt with, and only with, whether the State itself may decide to teach, in its schools, a necessarily-state-approved set of religious principles.

As for the state law claim, Washington vaguely suggests a governmental interest in the particularly "clear demarcation" of the religious from the secular under Washington's own State Constitution, asserting that a State may be more restrictive than the federal Constitution requires. Brief of Respondent at 35-36. The State offers no authority for the legitimacy of this interest, or for its dimensions. A State's alleged interest in creating a greater separation of "church and state" than needed under the federal Establishment Clause is not sufficiently compelling to justify state discrimination based on religion, where that discrimination collides with federal Free Exercise protections.[10] *Widmar v. Vincent*, 454 U.S. at 274-76.

Finally, the "narrow tailoring" requirement of *Lukumi* and its antecedents is also violated here. The prohibition on "pursuing a degree in theology" is at once under- and over-inclusive, and in particular is so broadly applicable as to disfavor all persons "pursuing a degree in theology," which has been interpreted to mean "for reasons of personal religious belief." The rule applies no matter what school the individual attends, no matter what use is to be made of the money involved, and whether or not any "offending" course work is even to be paid for by the recipient using funds that originally came from the government.[11] And, as noted above, Washington's rules deprive anyone pursuing a degree in theology not only of a Promise Scholarship but of "any state-funded student financial aid, including the new Washington Promise Scholarship." J.A. 61 (emphasis in

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[10]Significantly, not even the States writing as amici in support of the State of Washington take the position that following the dictates of state constitutions itself constitutes a compelling state interest. Rather, they note the contrary authority of *Widmar* without rejoinder. Brief of the States of Vermont, Massachusetts, Missouri, Oregon and South Dakota and the Commonwealths of the Northern Mariana Islands and Puerto Rico Amici Curiae in Support of Petitioners, at 9, 10.

[11]The anti-Catholic motivation behind Blaine Amendments generally and Washington State's in particular is undeniable. DeForest, 26 Harv. J.L. and Pub. Pol'y at 559-64, 570-73, 590-601. This historical prejudice and its relationship to present-day law is thoroughly analyzed in the brief amici curiae filed herein by The Becket Fund for Religious Liberty, and others. Brief of *Amici Curiae* The Becket Fund For Religious Liberty, the Catholic League for Religious and Civil Rights, and Historians and Scholars in Support of Respondent.

original). This is not narrow tailoring; it is a broadside attack on religious practice firing grapeshot, bar and chain.

CONCLUSION

In short, the Washington eligibility standard at issue here discriminates directly against Davey and individuals like him for reasons of religion. It does so, perversely, in a way that discriminates specifically against those who take religion most seriously and practice it most vigorously. This Court should make clear that it is no part of the work of government to discriminate against religious believers on that basis, or to prevent them from participating in governmental programs for which they would qualify. Religious differences are not to be feared or suspected, and that antipathy is certainly not to be enshrined in state legislation and enforced by our state governments.

Respectfully submitted,

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GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, *et al.*,

Petitioners,

v.

JOSHUA DAVEY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* FOR RELIGIOUS UNIVERSITIES AND COLLEGES, SPECIFICALLY THE ASSOCIATION OF SOUTHERN BAPTIST COLLEGES AND SCHOOLS, THE ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, AZUSA PACIFIC UNIVERSITY, BRIGHAM YOUNG UNIVERSITY, THE CATHOLIC UNIVERSITY OF AMERICA, LOMA LINDA UNIVERSITY, AND PEPPERDINE UNIVERSITY IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Free Exercise Clause prohibits the government from denying an otherwise-qualified individual equal access to taxpayer-funded benefits solely because he has chosen to use the benefits for goods or services that have a religious character.

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INTERESTS OF *AMICI CURIAE*

Amici are a diverse group of religious educational institutions concerned about the protection of religious liberty for themselves and their students, including protection against discrimination on religious grounds. *Amici* are troubled that laws like the State of Washington provision at issue here could unfairly deny their students the ability to qualify for generally available educational assistance. They also are concerned that, if the law here were found constitutional, other governments might choose to provide taxpayer-funded educational assistance in a way that discriminates against institutions like *amici*.

In seeking to prevent religion-based discrimination in the distribution of public resources, *amici* seek no special favors. Nor do they seek to use these resources in a way that ignores legitimate concerns about the fact or appearance of a religious establishment. What they seek, instead, is equal access—access on the same terms as other individuals and institutions, and in a manner that respects the need for an appropriate separation between church and State.[1]

STATEMENT

At the heart of this case lies a recurring issue of great importance to all religious institutions, their members and students. It is whether, when a government has chosen to create a system of taxpayer-funded benefits for which a person is otherwise qualified, the government may, consistent

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[1] A complete list of *amici*, with descriptions of each organization's interest in this litigation, is set forth in a Statement of Interest of *Amici Curiae* appended to this brief. Petitioners and respondent have consented to the filing of this brief in letters filed with the Clerk's office. The undersigned counsel alone have authored this brief, and no person or entity other than *amici* has made a monetary contribution to its preparation or submission. *See* Sup. Ct. R. 37.

with the Free Exercise Clause, deny that person equal access to those benefits solely on the ground that they might be used for goods or services that have a religious character rather than a purely secular one.

In recent years, this issue has figured most prominently in the debate over school vouchers. *E.g.*, *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002). But it also has arisen in a variety of other contexts, including the funding of student newspapers, *e.g.*, *Rosenberger* v. *Rectors & Visitors*, 515 U.S. 819 (1995); after-hours access to public school facilities, *e.g.*, *Good News Club* v. *Milford Central School*, 533 U.S. 98 (2001); funding of rehabilitative services to prison inmates, *e.g.*, *Freedom From Religion Foundation, Inc.* v. *McCallum*, 324 F.3d 880 (7th Cir. 2003); tax-exempt financing, *e.g.*, *Steele* v. *Industrial Development Board*, 301 F.3d 401 (6th Cir. 2001), *cert. denied*, 123 S. Ct. 1254 (2003) (No. 02-737), *and*, *id.* at 1273 (No. 02-936), and governmental aid to private colleges, *e.g.*, *Columbia Union College* v. *Clarke*, 159 F.3d 151 (4th Cir. 1998).

This issue has obvious importance for religious individuals and families who might wish to use generally available public benefits to obtain services in keeping with their religious values. Telling these citizens they can use public benefits to obtain services *only* so long as they have a secular rather than a religious character is tantamount to telling them that religion occupies a disfavored place in the community. See generally Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (1993).

This issue also has tremendous importance for institutions that provide services of a religious character, or in a religious environment. In an era when governments fund or subsidize a wider and wider array of goods and services, a rule allowing governments to preclude the use of otherwise-available public funds to purchase services from religiously oriented providers puts those providers at a severe disadvantage solely because

of their religion. And, again, it sends a message to the community that religious providers are somehow suspect or, at least, inferior to secular providers of similar services.

This case aptly illustrates this pervasive problem. Here, the State of Washington chose to create a broad benefit program, the Promise Scholarship, "to encourage excellent academic performance and to reward low- and middle-income students who demonstrated meritorious achievement in high school."[2] See Pet. App. 8a-9a. The program permits recipients to use their scholarships to attend any accredited, in-State higher education institution—be it public or private or even religious. *Id.* The scholarship funds are paid directly to the student—in this case, Respondent Joshua Davey—and may be used to cover a variety of educational expenses, including room, board, and textbooks. J.A. 58. Promise Scholars can choose to study any subjects they wish, including religion. See Pet. Br. 5-6 ("it does not prohibit the secular study of the topic of religion"; indeed, "public colleges and universities in Washington teach about religion"). But an otherwise-qualified recipient is disqualified if he or she chooses to major in one, and only one, course of study: theology. Pet. App. 10a.

In short, under Washington's program, otherwise-qualified beneficiaries may be disqualified because their choice of major is religiously motivated, that is, they wish to study religion *from a religious perspective*. See *id.* Such a policy carries an obvious message of disapproval of respondent's religious beliefs and, indeed, his religious motivation.

Washington's policy also carries with it a message of disfavor to religious institutions. Here, respondent was awarded a Promise Scholarship and sought to use it to major in pastoral studies (as well as business management) at

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[2] Washington Higher Educ. Coord. Board ("HECB"), *Washington Promise Scholarship Program Evaluation* 1 (2002), *available at* http://www.hecb.wa.gov/docs/reports/WaPromiseEval12-2002.pdf.

Northwest College, an accredited religious institution. Pet. App. 3a.[3] As petitioners concede, "Northwest's concept of education is distinctively Christian." Pet. Br. 10. Indeed, every student who applies to Northwest is "required to indicate 'a personal commitment to Jesus Christ as Lord and Savior.'" Pet. App. 3a. Moreover, "all" courses at Northwest have "religious content." J.A. 151; see *id.* 168-69. Yet petitioners concede they have no objection to respondent's using his scholarship to pursue general course work (including courses in religion) or a business management degree at Northwest, provided he does not actually *major* in pastoral studies. Pet. Br. 25. Given its religious character, however, Northwest considers its major in pastoral studies a core part of its curriculum. Thus, for the State to disqualify respondent based solely on his choice of that major is, in effect, also a governmental "disendorsement" of the institution and its religious mission.

For all these reasons, *amici* are deeply concerned about an argument, such as that advanced by petitioners and their *amici*, that would allow a government to create this kind of second-class citizenship for those who, as a matter of private choice, would spend public aid on services that have a religious character or perspective.

SUMMARY OF ARGUMENT

I. Government action that targets all religions or religious viewpoints for inferior treatment is not "neutral" towards religion and is, accordingly, subject to strict scrutiny. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533 (1993) ("*Lukumi*"). Like other forms of invidious discrimination, such as that based on race,

[3] It is undisputed that respondent's calling to the ministry, and to study pastoral studies in furtherance of that calling, is a sincerely held religious belief. *See* Pet. Br. 9 ("Davey is a Christian committed to living out his faith in every aspect of his life.").

discrimination on the basis of religion sends a message of disapproval or "disendorsement" from government. This disfavor alone imposes an inherent harm warranting strict scrutiny review, without the need to show any additional other burden, because the Free Exercise Clause "'protect[s] religious observers against unequal treatment.'" *Lukumi*, 508 U.S. at 542 (alteration in original).

Thus, where a public funding program discriminates on the basis of religion, the Free Exercise Clause requires strict scrutiny whenever the government puts a recipient to a Hobson's choice between receiving a governmental subsidy to which he or she is otherwise entitled and using that subsidy to purchase goods or services from a religiously oriented provider. See *Perry* v. *Sindermann*, 408 U.S. 593 (1972). Although government is not required to subsidize the exercise of constitutional rights, its programs cannot distinguish among recipients based on the exercise of those rights unless the government is prepared to meet the demands of strict scrutiny. Because the program at issue here discriminates solely on the basis of a religious choice—to pursue a degree in theology rather than a secular subject—the program is subject to strict scrutiny.

II. In this case, the State has not even attempted to show that its program satisfies strict scrutiny. And, if the State attempted such a justification, it would fail: the exclusion of otherwise-qualified recipients solely because they choose to major in theology cannot be narrowly tailored to further any imaginable compelling governmental interest.

To be sure, several of the State's *amici* assert that exclusions such as those here are necessary to protect State establishment principles that are stricter than those mandated by the federal Establishment Clause. However, especially where the aid is indirect and does not go primarily to religious organizations (thereby avoiding even the appearance of state advancement or endorsement of religion), a government cannot claim as a compelling interest a desire to effect a more

complete separation of church and state than that required by the federal constitution. That is not to say that States cannot legitimately pursue that objective. They can. And they retain a variety of constitutionally acceptable means of doing so. But they cannot pursue those policies in a way that infringes rights protected by the federal Free Exercise Clause.

ARGUMENT

This Court knows all too well the proper legal standard for determining the validity of a law that allegedly infringes a core First Amendment protection, such as free exercise of religion. It is first necessary to determine whether the policy is subject to strict scrutiny. If it is, the Court then decides whether the State can satisfy strict scrutiny by showing that its policy is narrowly tailored to advance a compelling governmental interest. Each of these issues is addressed in turn below.

I. THE FREE EXERCISE CLAUSE REQUIRES STRICT SCRUTINY OF ANY GOVERNMENT DISCRIMINATION ON THE BASIS OF RELIGION.

There can be no serious question that a government policy that discriminates against religion is subject to strict scrutiny, even if the policy discriminates against all religions equally. Such a policy is not "neutral" with respect to religion, and therefore is not subject to the limitation adopted by this Court in *Employment Division* v. *Smith*, 494 U.S. 872 (1990) ("*Smith*"). Contrary to the arguments advanced by petitioners and their *amici*, moreover, a law that discriminates against religion is subject to strict scrutiny even without a separate showing of a burden on religion. And that is as true for government funding of programs as for other kinds of government action.

A. A Law That Discriminates Against All Religions Or Religious Viewpoints Equally Is Not "Neutral."

"The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in [the Court's] opinions." *Lukumi*, 508 U.S. at 523. Although laws that discriminate against all religion may be rare, and thus "not often at issue" in the Court's Free Exercise Clause jurisprudence, *id.* at 533, there can be no doubt about how they should be scrutinized: "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some *or all* religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Id.* at 532 (emphasis added).[4]

Likewise, in *Smith*, this Court observed that the Free Exercise Clause would be violated if government generally permitted certain "acts or abstentions," but then "sought to ban [them] only when they are engaged in for religious reasons, or only because of the religious belief that they display." *Smith*, 494 U.S. at 877. Justice O'Connor's concurring opinion reflected a similar view, even while expressing concern that the majority opinion might protect

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[4] Even the concurring opinions in *Lukumi* readily accepted this general principle. Fully agreeing with this nondiscrimination mandate, several Justices wrote separately to urge greater free exercise protection for *neutral* and generally applicable laws that burden religion than that provided for in *Employment Division* v. *Smith*, 494 U.S. 872 (1990). Justice Souter, urging a reexamination of *Smith* as to neutral laws, recognized the "principle about which there is no disagreement, that the Free Exercise Clause bars government action aimed at suppressing religious belief or practice." *Lukumi*, 508 U.S. at 559 (concurring in part and in judgment). Justice O'Connor joined Justice Blackmun in pointing out that the First Amendment embodies the "value of religious freedom as an affirmative individual liberty" and that protection operates independently of the Amendment's acknowledged "antidiscrimination principle." *Id.* at 577-78 (concurring in judgment).

too narrow a range of religious exercise. As her opinion put it, "few States would be so naïve as to enact a law directly prohibiting or burdening a religious practice as such." *Id.* at 894 (O'Connor, J., concurring in judgment).[5]

1. This, however, is that rare case in which a State has chosen to discriminate overtly against religion by disqualifying an otherwise-qualified student from a Promise Scholarship simply because he or she chooses to major in theology. Indeed, in that respect, the Washington policy is similar to the broad religious discrimination addressed in *McDaniel* v. *Paty*, 435 U.S. 618, 620 (1978).

That decision struck down a state law prohibiting clergy "'of any denomination whatever'" from serving as state delegates. *Id.* The Court was clear: "The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such." *Id.* at 626. The law, moreover, was invalidated because it "impose[d] special disabilities on the basis of religious views or religious status." *Smith*, 494 U.S. at 877.

The religious exclusion in this case does the same thing. This case therefore gives the Court an important opportunity to reaffirm that all laws that single out religion in general for disfavored treatment, either facially or as applied, are subject to strict scrutiny.

2. Not surprisingly, petitioners and their *amici* nevertheless believe that such discrimination is not subject to strict scrutiny. Relying upon *Smith*, they contend that, in the words of one *amicus*, the Washington program is not subject

[5] Indeed, the Court's free exercise decisions usually have arisen in the context of laws that burden a particular religion or religious practice. *See, e.g.*, *Lukumi*, 508 U.S. at 531-46 (Santeria religion); *Smith*, 494 U.S. at 874 (Native American Church); *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 447-53 (1988) (lands sacred to the Yurok, Karok, and Tolowa Indians); *Sherbert* v. *Verner*, 374 U.S. 398, 403-06 (1963) (Seventh-Day Adventists).

to strict scrutiny because "[i]t does not target any *specific* religious practice or religious group." Br. of *Am. Cur.* Nat'l Sch. Bds. Ass'n 16-17 (emphasis added). They are wrong.

As noted above, *Smith*'s reasoning is squarely at odds with the notion that only discrimination *among* religions triggers strict scrutiny. Moreover, in the years since *Smith*, the Court has squarely held that, when laws that infringe religious exercise are not neutral towards "religion" (or not of general applicability) they *are* subject to strict scrutiny. See *Lukumi*, 508 U.S. at 531-32; *Smith*, 494 U.S. at 885. A law or policy that discriminates against all religion, like that at issue here, clearly is not "neutral" with respect to "religion." As the Court put it in *Lukumi*, "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." 508 U.S. at 533; see *Smith*, 494 U.S. at 877-88.

The Court has also recognized two distinct ways in which a law may fail *Smith*'s neutrality requirement. First, the law may be *facially* non-neutral, for example, in that it "refers to a religious practice without a secular meaning discernible from the language or context." *Lukumi*, 508 U.S. at 533. Second, the law may be *practically* non-neutral, in that it is applied in a manner that targets religion as such. *Id.* at 534 ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality."). Thus, even where a law is not facially discriminatory, a reviewing court must still "survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Walz* v. *Tax Comm'n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring).[6]

[6] Similarly, the general applicability requirement is offended "when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Lukumi*, 508 U.S. at 542-43.

Applying this analysis, the Court in *Lukumi* concluded that government restrictions on ritual animal sacrifice were not "neutral" (and indeed not "generally applicable") because only religious animal killing was outlawed. 508 U.S. at 536-37. Numerous other kinds of animal killing, including hunting and commercial slaughtering, were exempt. *Id.* That is, similar conduct was permitted when it had a secular motivation, but prohibited if it had a religious motivation. That, the Court held, was sufficient to make the law non-neutral. *Id.* at 547.

In short, contrary to the arguments of petitioners and their *amici*, when government singles out not just one religion, but all religions, for discriminatory treatment, its action is subject to strict scrutiny. As the Ninth Circuit correctly recognized, the program here is neither facially nor practically neutral, and therefore must be analyzed under that "exacting" standard. Pet. App. 29a-31a.

B. A Law That Discriminates On Religious Grounds Is Subject To Strict Scrutiny Without Any Separate Showing Of A Burden On Religion.

Petitioners and their *amici* are also wrong in contending that Washington's policy does not trigger strict scrutiny because it does not make compliance with religious teachings impossible or illegal. See, *e.g.*, Pet. Br. 12, 24-26, 36-39; Br. of *Am. Cur.* State of Vermont 8; Br. of Am. Cur. Anti-Defamation League 9 (suggesting that because "Davey's religious practice has not been outlawed by the state," he has "suffered no harm"); Br. of *Am. Cur.* Nat'l Sch. Bds. Ass'n 15-16 (same). This argument fails for at least two reasons.

1. First and most obviously, once a law is shown not to be neutral or generally applicable under the analysis in *Smith*, all that must be shown to trigger strict scrutiny is that the law "burdens" religion in some fashion. It is not necessary to show that the discrimination puts individuals to the Hobson's

choice of complying with the requirements of their government or their faith.

On the contrary, non-neutral laws can infringe free exercise and substantially burden religion where the denial only makes religious exercise comparatively more expensive. That was the holding, for example, in *Sherbert* v. *Verner*, 374 U.S. 398 (1963). There, the Court rejected the argument that a free exercise violation could not exist because the law at issue did not actually "prevent" plaintiff from practicing her religion, it just made her ineligible for a "privilege." *Id.* at 404. As the Court put it, "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing conditions upon a benefit or privilege," even absent an outright prohibition. *Id.* at 404 & n.6.

2. In any event, governmental discrimination on the basis of religion is sufficient to trigger strict scrutiny, without any separate showing of religious burden. As this Court put it in *Lukumi*, the Free Exercise Clause "'protect[s] religious observers against unequal *treatment*.'" *Lukumi*, 508 U.S. at 542 (emphasis added, alteration in original); see *id.* at 579 (Blackmun, J., joined by O'Connor, J., concurring in judgment) ("When a law discriminates against religion as such . . . it automatically will fail strict scrutiny."). Accordingly, as the Court put it in *Smith*, "we strictly scrutinize governmental classifications based on religion." *Smith*, 494 U.S. at 886 n.3.

Treating religious discrimination as constituting a sufficient "burden" on religion to invoke strict scrutiny fits well within the fabric of civil-rights law. Invidious classifications of citizens based upon religion, like those based on race, "'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Shaw* v. *Reno*, 509 U.S. 630, 643 (1993) (quoting *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943)); accord *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin* v. *Florida*, 379 U.S. 184,

192 (1964). In the case of religion, this is so for at least two reasons.

The first reason such classifications are so "odious" is the stigma they create. In the case of race, the Court has often held that laws that classify by race "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Shaw*, 509 U.S. at 643.[7] Similarly, in the case of religion, the Court has "often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general." *Lukumi*, 508 U.S. at 532; see *Zelman* 536 U.S. at 669 (O'Connor, J., concurring) (First Amendment "'does not require the state to be [religion's] adversary'") (quoting *Everson* v. *Board of Educ.*, 330 U.S. 1 (1947)).[8]

Indeed, an exclusion based on religion "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected," *Romer* v.

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[7] The Court's race discrimination cases, moreover, teach that government segregation can itself be a dignitary harm—even when the government still affords the benefit in question on a "separate but equal" basis—because it generates "a feeling of inferiority as to [the protected person's] status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown* v. *Board of Educ.*, 347 U.S. 483, 494 (1954); *cf. Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 250 (1964) (noting, under Title II, "'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments'"). Thus, treating students differently "solely on the basis of race" deprives them of "equal educational opportunities" even if the "physical facilities and other 'tangible' factors may be equal." *Brown*, 347 U.S. at 493.

[8] The equal protection analogy is particularly useful given that "[i]n determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases. As Justice Harlan noted in the related context of the Establishment Clause, '[n]eutrality in its application requires an equal protection mode of analysis.'" *Lukumi*, 508 U.S. at 540 (Kennedy, J.) (citing *Walz*, 397 U.S. at 696 (concurring opinion)).

Evans, 517 U.S. 620, 634 (1996)—in this case, those who wish to integrate their religion into their education. See *Lukumi*, 508 U.S. at 547 ("upon even slight suspicion that proposals for state intervention stem from animosity to religion . . . , all officials must pause to remember their own high duty to the Constitution and to the rights it secures"). As the Ninth Circuit concluded, the mere exclusion from a government program for pursuing a degree in theology "necessarily communicates disfavor." Pet. App. 22a. The notion that "the religious need not apply" is antithetical to the fundamental purpose of the Free Exercise Clause and should be subject to the highest judicial scrutiny for that reason alone.

In short, principles of nondiscrimination based upon a respect for central aspects of individual identity and dignity have as much force in the area of religion as in the area of race. Accordingly, the stigma created by religious discrimination should be sufficient to trigger strict scrutiny.

Second, because religion is in large measure a choice rather than an immutable characteristic, religious discrimination tends to create subtle (and sometimes not-so-subtle) coercive pressure on individual conscience. Thus, where government demands that an individual conform to a particular religious (or even an a-religious) norm as a condition of a government benefit, "[t]he harm is the interference with the individual's scruples or conscience"—an area that should be "fence[d] off from government." *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring). The burden that such discrimination imposes on religion is "as plain as it [was] in Soviet Russia, where a churchgoer is given a second-class citizenship, resulting in harm though perhaps not measurable in damages." *Id.* Thus, even if it produces no financial hardship or other tangible harm, the psychic discomfort of being treated differently because of a person's religious preferences or choices is itself a cognizable harm because of its inevitably coercive effect.

Accordingly, even though religious discrimination may sometimes be accompanied by more concrete harms—such as criminal prosecution or restrictions on otherwise-available privileges or benefits—such discrimination is properly treated as sufficient to trigger strict scrutiny.[9]

C. A Denial Of Public Funding Requires Strict Scrutiny Where The Denial Is Based Upon Religion-Based Choices.

As these principles establish, denials of public funding that single out religion for adverse treatment, no less than other more direct discrimination on the basis of religion, trigger strict scrutiny. In this respect, this case presents a classic example of an unconstitutional condition on public funding. As the Court explained in *Perry* v. *Sindermann*, 408 U.S. 593 (1972), "if the government could deny a benefit to a person *because of* his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." *Id.* at 597 (emphasis added).[10] This logic applies with equal force to the free exercise of religion. As *Regan* v. *Taxation With Representation*, 461 U.S. 540 (1983), proclaimed more broadly, "the government may not deny a benefit to a person because he exercises a

[9] In all events, strict scrutiny should be applied because this case also involves a "hybrid situation" that implicates respondent's Free Speech and Equal Protection rights. *See Smith*, 494 U.S. at 881-82; *see generally* William L. Esser IV, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?*, 74 Notre Dame L. Rev. 211 (1998); *Chalifoux* v. *New Caney Ind. Sch. Dist.*, 976 F. Supp. 659, 670-71 (S.D. Tex. 1997) (applying hybrid rights analysis to school's banning of rosary beads as gang symbols).

[10] To similar effect is *Speiser* v. *Randall*, 357 U.S. 513 (1958). *Speiser* involved a California regulation that required anyone seeking a property tax exemption to declare that he or she did not advocate the forcible overthrow of the United States government. This Court stated that "[t]o deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech." *Id.* at 518.

constitutional right." *Id.* at 545 (citing *Perry*, 408 U.S. at 597).

Here, there can be no question that revocation of respondent's Promise Scholarship because of a religiously motivated choice to declare a major in theology burdens his free exercise of religion. See, *supra*, n.3. Such a burden—regardless of the level of hardship—plainly triggers strict scrutiny.

1. Petitioners and their supporters nevertheless argue that, at least in the context of subsidy programs, government is free to discriminate on the basis of constitutionally protected criteria, citing *National Endowment for the Arts* v. *Finley*, 524 U.S. 569 (1998). In *Finley*, the Court upheld, against a Free Speech challenge, a policy that permitted the National Endowment for the Arts ("NEA") to use "'decency and respect'" as criteria in deciding which art programs to fund. *Id.* at 576. Petitioners argue that, because the Court held that NEA funding did not create a limited public forum, and thus that strict scrutiny did not apply there, the Court should hold that Washington's action does not trigger strict scrutiny either. Pet. Br. 44-45.

But the Court in *Finley* did not so hold. Petitioners quote from a *concurring* opinion in that case that rejected the limited public forum rationale. *Finley*, 524 U.S. at 599 (Scalia, J., concurring in judgment). The majority opinion, however, explicitly recognized that the "First Amendment certainly has application in the subsidy context." *Id.* at 587. The Court, moreover, pointed out that the competitive funding at issue there differed from the widely available and neutrally administered resources at issue in cases such as *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384 (1983), and *Rosenberger*. That was because the NEA could apply criteria of excellence and decency that it could not apply if it were directly regulating speech or operating a program of general subsidies. And even in that context, the Court expressly warned that the wide

latitude to set spending priorities could "not infringe on other constitutionally protected rights." *Finley*, 524 U.S. at 588.

What *Finley* stands for, therefore, is that in running competitive funding programs, a government can use criteria that would otherwise be invalid under the Free Speech Clause, as long as it does not run afoul of *other* constitutional limits. For instance, the NEA could reject art for aesthetic reasons, and even reasons of decency, but it could not choose (or refuse) to fund only artists who were white or black. And, to bring the point closer to home, neither could it choose (or refuse) to fund only artists who were Jewish, or Protestant, or Catholic, or Muslim, or secularist.

Yet this, in essence, is what Washington is doing in its scholarship program—drawing lines along constitutionally forbidden religious lines. Unlike *Finley*, the Washington program lacks the avowedly subjective element of artistic judgment that characterized the selection process at issue there. In this case, by contrast, if a student attains a certain class rank and income level, and enrolls in an accredited school, one obtains the Promise Scholarship money as of right—except, of course, if one decides to major in theology. This is, therefore, just the type of infringement on "other constitutionally protected rights" that *Finley* expressly forbids.

2. Other government subsidy decisions invoked by petitioners and certain *amici* are equally inapt. Significantly, in both *United States* v. *American Library Ass'n*, 123 S. Ct. 2297 (2003), and *Rust* v. *Sullivan*, 500 U.S. 173 (1991), the plaintiffs sought funding for classes of activities that were plainly *outside* the parameters of the government program altogether.

In *American Library Ass'n*, for example, the Court rejected a First Amendment challenge to a federal program that helped provide public libraries with Internet access on the condition that pornography filters be installed. The Court reasoned that

the federal initiative did not single out pornographic speech for improper censorship because the program's intent was "not to 'encourage a diversity of views from private speakers,' but . . . to facilitate research, [and] learning." 123 S. Ct. at 2305 (quoting *Rosenberger*, 515 U.S. at 834). In short, the government was paying for research infrastructure, not sponsoring any speech—pornographic or otherwise—so there was no singling out based on the exercise of a constitutional right.

Here, by contrast, petitioners established the Promise Scholarship program to provide educational funding for any academically gifted and financially needy student wishing to study at an in-State, accredited college or university. Having created such a broad program, the State then singled out a single major—theology, *i.e.*, religion taught from a religious perspective—for exclusion from the program.

Nor does *Rust* give petitioners any comfort. There, the Court upheld regulations that prohibit the use of federal funds provided under Title X of the Public Health Services Act, 42 U.S.C. §§ 300 to 300a-6, for abortion counseling. The Court distinguished this constraint from that in *Perry*, "because here the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized." *Rust*, 500 U.S. at 196. That is, Title X funds were authorized for "'*preconceptional* counseling, education, and general reproductive health care,'" not "'pregnancy care (including obstetric or prenatal care).'" *Id.* at 179 (quoting 42 C.F.R. § 59.2 (1989)) (emphasis added). Thus, those who wanted to use Title X funds for post-conception medical procedures, including abortion, were not selectively penalized "because of their constitutionally protected speech." To the contrary, those who received Title X funds could not convey information about abortion simply because Title X does not cover *any* post-conception care.

Here, by contrast, respondent has been excluded from the Promise Scholarship program "because of" his constitutionally protected right to choose to study religion from a religious point of view, and to prepare himself for the ministry rather than any secular profession. Like *American Library Ass'n*, *Rust* is simply inapt.

3. Petitioners and their *amici* also attempt to defend the Washington program on the ground that States are "not required to subsidize" the exercise of constitutional rights. Pet. Br. 22-32; see Br. *Am. Cur.* Nat'l Educ. Ass'n 1; Br. *Am. Cur.* Nat'l Sch. Bds. Ass'n 13-14. That may well be true in the abstract. But once the State elects to fund a given class of activity, it cannot then exclude an otherwise-eligible individual who would, as a matter of private choice, use that funding in aid of his religious exercise, without satisfying strict scrutiny. See Sec. I.A. & B, *supra*. Yet, in the present case, the State has mandated the forfeiture of an otherwise-available scholarship because of the exercise of religion, and is therefore invidiously discriminating against students like Respondent Davey.

This case, moreover, is not analogous to a governmental decision not to fund abortions. To the contrary, in the health care context, it is more closely analogous to a government decision to fund all health care of a given kind, but then exclude those who would make an otherwise-permissible health care choice based on religious reasons. For example, it is analogous to the State creating a health care allowance that could be spent on all circumcisions *except* those performed for religious reasons. The discrimination inherent in such a program would plainly trigger strict scrutiny, and the discrimination inherent in the Washington program triggers strict scrutiny for the same reasons.

In sum, the government may be free to establish spending programs that, based on religion-neutral criteria, incidentally exclude religiously motivated activity along with non-religious activity. But when government adopts a religious

criterion for determining eligibility for public funds, it must be prepared to satisfy the demands of strict scrutiny.

II. GOVERNMENT DISCRIMINATION ON THE BASIS OF RELIGION CANNOT BE JUSTIFIED BY A DESIRE TO AVOID INDIRECT PUBLIC FUNDING OF RELIGIOUS ACTIVITY, PARTICULARLY WHERE THERE IS NO GENUINE ENDORSEMENT OF RELIGION.

The conclusion that the religious discrimination imposed by Washington here is subject to strict scrutiny is fatal to Washington's program. That is because the State has not attempted to show, and could not show, that its policy is narrowly tailored to a compelling governmental interest. *E.g.*, *Lukumi*, 508 U.S. at 533. Indeed, as the Court held in *Lukumi*, "[a] law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." *Id.* at 546.

Here, as shown below, the State cannot justify its religious discrimination merely by invoking a desire to avoid indirect public funding of a religious activity. To be sure, States have a compelling interest in adopting rules to avoid genuine Establishment Clause violations. But they cannot shield themselves from remote Establishment Clause risks by blatantly infringing Free Exercise Clause values. Moreover, the aid at issue here—otherwise neutral, widely available, indirect, voucher-type aid—falls well outside the "play in the joints" that this Court has held may exist between the requirements of the Free Exercise Clause and the Establishment Clause.

A. A Desire To Avoid Funding Religious Activity Cannot Be A Compelling Governmental Interest Justifying Religious Discrimination Where, As Here, The Funding Of Religion Is Indirect And Creates No Genuine Endorsement Of Religion.

1. Petitioners and their *amici* cannot seriously claim that the religious discrimination inherent in Washington's policy is required by the federal Establishment Clause. Indeed, in a virtually identical context (and in a case arising from the same State), this Court has already unanimously rejected the argument that the federal Establishment Clause requires the kind of religious exception at issue here. See *Witters* v. *Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986).

Most recently, moreover, the Court's decision in *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002)—a case petitioners do not address—upheld the constitutionality of a voucher program where the vast majority of recipients used the vouchers at parochial schools. *Zelman* underscored the point that where indirect, voucher-style aid is concerned, the free choice of private persons to use that aid for religious purposes is not an Establishment Clause concern. As *Zelman* made clear, the line of cases from *Mueller* v. *Allen*, 463 U.S. 388 (1983), *Witters*, and *Zobrest* v. *Catalina Foothills School District*, 509 U.S. 1 (1993), affirm the principle that the "deliberate choices of numerous individual recipients," 536 U.S. at 652, and not the government's desire to restrict its funds, is the controlling factor with respect to indirect funding of religious activity.

Here as well, the choice of how to spend the Promise Scholarship dollars, as well as the choice of majors, lies with the recipient, not with the State. And the intervening choice of recipients, such as respondent, relieves any concern that the State is supporting religion, or appearing to support religion, as opposed to supporting the recipient. *Id.* at 655;

accord *Mitchell*, 530 U.S. at 842-43 (O'Connor, J., concurring in judgment).

Thus, on this point, the question before the Court is whether a State may engage in religious discrimination to enforce a separation of church and state that is appreciably wider than that required by the Establishment Clause, particularly where no informed observer could reasonably conclude that, by allowing respondent to choose to spend his scholarship money in pursuit of a theology degree, the State is somehow endorsing his particular religion, or religion in general. The answer, plainly, is "no."

2. The federal Establishment Clause has of course been construed to forbid *direct* use of "general assessments in support of religion," a practice which "lie[s] at the core of the prohibition against religious funding." *Rosenberger*, 515 U.S. at 851 (O'Connor, J., concurring). But this ban has not been viewed as prohibiting States from providing religiously neutral aid that has a primarily secular purpose and that only incidentally and/or indirectly furthers or supports the religious mission of religious organizations.

In *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), for example, the Court recognized that, in a number of decisions, it had allowed State benefits to go to church-related schools as long as the benefits were secular, neutral, or non-ideological, and went primarily to the students or, if they went directly to the church-related school, were in no way to be used to further a religious purpose. Such permissible aid included bus transportation, school lunches, public health services, and secular textbooks. *Id.* at 616-17. Under *Lemon*, first, the "purposes" of the act must be "manifestly secular." Second, the primary "effect" of the legislation must not be to advance or inhibit religion. Third, the program must not create an "excessive entanglement" between church and state.

More recently, the Court has modified and clarified the *Lemon* test in a way that makes it abundantly clear that the

type of benefit provided by the Washington scholarship program—*i.e.*, otherwise neutral, widely-available aid that only incidentally and remotely furthers the religious educational purposes of school, and has a primarily secular purpose—is permitted under the Establishment Clause. In *Agostini* v. *Felton*, 521 U.S. 203 (1997), a *direct* aid case, the Court allowed teachers hired by the State to present secular subjects to school children on parochial school premises. The Court ruled that the state aid was religiously neutral, went directly to the eligible students, and did not supplant an educational function that the school would otherwise have been required to provide. *Id.* at 210, 226, 228-30, 234, 235.

Similarly, in *Mitchell* v. *Helms*, 530 U.S. 793 (2000), the Court held that giving State educational materials *directly* to religious schools was acceptable where that aid was religiously neutral and where there were safeguards in place to prevent that aid from being used for religious purposes. *Id.* at 810-14; *id.* at 841-88 (O'Connor, J., concurring in judgment).

In a refinement of the *Lemon* test, the majority opinion in *Agostini* and the controlling opinion in *Mitchell* set out a three-part test to decide if state aid impermissibly advances or endorses religion. *Id.* at 845 (O'Connor, J., concurring in judgment). The first question is whether "the aid results in government indoctrination." The second is whether the program "defines its recipients by reference to religion." And the third is whether it creates an "excessive entanglement between government and religion." *Id.*

The Promise Scholarship program, if extended to theology students, would not violate any of the criteria of this most recent (or even the original) explication of the *Lemon* test. First, State scholarship funds would not advance religious indoctrination by the government because the private individual has full and free choice where to go to school and

what to learn.[11] Second, giving the scholarship to all majors would remove the present practice of excluding certain recipients by reference to religion. Third, the fear of "excessive entanglement" between church and state would not be implicated because of the intermediary of individual student choice. Moreover, including all students regardless of major would *reduce* entanglement. The state would not have to inquire whether a particular school's religious studies program was "academic" or "sectarian."[12]

In short, the Court has repeatedly held that even *direct* aid to religious institutions can satisfy the demands of the Establishment Clause if it satisfies these three criteria. *A fortiori*, a program of *indirect* aid that satisfies these criteria—and indeed is less substantial than that which the Court has already found acceptable in *Agostini* and *Mitchell*—is far outside any "gray area" or "play in the joints" that may exist between the point where Establishment Clause concerns end and Free Exercise Clause values begin.[13]

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[11] Many persons who study theology, even in sectarian programs, use that degree not to promote religion (at least as, for example, a priest or pastor), but as a foundation for further study in a wide variety of non-religious fields, including business, law, medicine and education. Thus, even the education of theology students, although an incidental and attenuated effect of the Washington scholarship program, fulfills in significant part the State's secular purpose of furthering higher education.

[12] By contrast, with the theology exclusion, petitioners' program runs afoul of two of the three prongs of the Court's Establishment Clause test. It explicitly defines scholarship recipients by religious criteria, excluding those it deems to be studying within sectarian religion departments. It also creates excessive entanglement in determining what institutions might offer sectarian versus academic programs in theology.

[13] The indirect nature of the scholarship money also obviates the need for the safeguards set up in *Agostini* and *Helms* to ensure that money will not be used for religious purposes. Because the scholarship money is in the hands of a private actor, who decides whether to put it to religious use, there is no real risk that such use will be viewed as "State action" by *informed* observers. *See, e.g., Wallace* v. *Jaffree*, 472 U.S. 38, 69-70

B. Even If They Cannot Claim A Compelling Interest In Creating A Stricter Separation Of Church And State Than Required By Federal Law, States Still Have Ample Room To Pursue Such A Separation.

That is not to say, as claimed by various *amici* in support of petitioners, that such a result deprives governments of the discretion to pursue a stricter separation of church and state than that required by the Establishment Clause. See, *e.g.*, Br. *Am. Cur.* State of Vermont 3. A proper respect for the demands of the Free Exercise Clause allows ample room for State policy-making in this important area.

Here, of course, the Promise Scholarship comes nowhere near the boundary of this concern. Washington merely asserts, without support, an alleged constitutional harm from Davey's receipt of the Promise Scholarship. But this Court has long held that speculative and insubstantial fears of a constitutional violation are an insufficient governmental interest, one which is neither compelling nor legitimate. See, *e.g.*, *Wisconsin* v. *Yoder*, 406 U.S. 205, 221 (1972) (rejecting

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(1985) (O'Connor, J., concurring in judgment) (focussing on whether an informed observer would believe government action can fairly be seen as "endorsing" a particular religious belief); *Corporation of the Presiding Bishop* v. *Amos*, 483 U.S. 327, 348-49 (1987) (O'Connor, J., concurring in judgment) (focussing on the informed observer in determining likely "endorsement" consequence of a religious exemption to a generally applicable statute). Thus, the State cannot justify the policy at issue here based upon an interest, however compelling it may be in the abstract, in avoiding the appearance of governmental endorsement.

Perhaps a State in another case could claim such an interest if the aid would otherwise go directly to the religious institution, without the intermediary of private choice, or if the aid, albeit indirect, was used primarily to benefit religious institutions—even if those results were found not to violate the federal Establishment Clause. But absent such circumstances, a desire to create a more complete separation between church and state than the federal Establishment Clause requires cannot be considered a compelling State interest.

"a sweeping claim" of government interest as not sufficiently concrete "[w]here fundamental claims of religious freedom are at stake"), see also *Denver Area Educ. Telecomm. Consortium, Inc.* v. *FCC*, 518 U.S. 727, 773-74 (1996) ("When the Government acts to suppress directly the dissemination of [indecent] speech," under strict scrutiny review, "it may not rely solely on speculation and conjecture.") (Stevens, J., concurring). As in *Lukumi*, the purported governmental interest here appears to be merely a fig leaf for the State's anti-religious animus. 508 U.S. at 533-39.

1. Even if a prohibition on State discrimination against religion is the only way to satisfy strict scrutiny in a particular case, such a prohibition need not inhibit the States' ability to impose many other types of restrictions on the provision of public money to religious pursuits beyond what is required by the Establishment Clause. For example, a State that chooses to provide food stamps could limit its program to only certain essential foods, or to foods with certain nutritional qualities, or to foods that were not luxury items. It could not, however, create a program to fund essential food items for poor people but then exclude only kosher foods from the list of acceptable items or refuse to allow only kosher stores to participate in the program.

Likewise, in the context at issue here: Washington could pursue a variety of strongly separationist policies for its scholarship program that would not run afoul of the Free Exercise Clause. For example, absent evidence that religious schools were being targeted, the Promise Scholarship could be offered only to students who attend public schools. Or the program could be offered only to students who study particular subjects, such as math and engineering. Or it could be offered only to students who plan to attend a school focused on particular professional training, such as teaching or medical care.

Indeed, as long as the list of disciplines for which this indirect funding is aimed does not reflect an illicit attempt to gerrymander religion out of the program, Washington can administer its program in numerous constitutionally permissible ways. What it cannot do, however, is open up a broad funding program for which an individual is otherwise qualified, and then directly or indirectly disqualify that individual solely on the basis of religion.

2. This conclusion is hardly surprising, given that a State's interest in achieving greater separation of church and state than that provided by the federal Establishment Clause has always been limited by the federal Free Exercise Clause. For example, in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), the Court struck down a university's policy of prohibiting religious groups from meeting in its facilities despite the State's desire to achieve greater separation. *Id.* at 276. Likewise, in *Good News Club* v. *Milford Central School*, 533 U.S. 98 (2001), the Court held that a public school's exclusion of a private club from after-hours use of public school facilities because of its "religious nature" constituted unconstitutional viewpoint discrimination. *Id.* at 107-12. The Court further held that there was no valid governmental Establishment Clause interest in preventing private religious groups from meeting in school facilities after school and that government neutrality toward religion is satisfied by permitting equal access. And, "[b]ecause [the Court] h[e]ld that the exclusion of the Club on the basis of its religious perspective constitutes unconstitutional viewpoint discrimination, it is no defense for [the government] that purely religious purposes can be excluded under state law." *Id.* at 108 n.2.

To be sure, the Court has long recognized the existence of some "play in the joints" between the Free Exercise and Establishment Clauses of the First Amendment in the sense that the "limits of permissible state *accommodation* to religion are by no means co-extensive with the

noninterference mandated by the Free Exercise Clause." *Walz*, 397 U.S. at 673 (emphasis added); see *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 81 (1980) (States may "adopt in [their] own Constitution[s] *individual liberties more expansive* than those conferred by the Federal Constitution.") (emphasis added). *Amici* seek, however, to establish a "play in the joints" dedicated not to the expansion of religious freedom but for further separation of church and state. They cite no authority for this novel use of the concept of "play in the joints" to *restrict* religious freedom.

This Court's decisions certainly do not use the phrase that way. In *Walz*, for example, the Court expanded religious liberty by approving New York's grant of a property tax exemption to religious organizations for property used solely for religious purposes. In doing so, the Court noted its "struggle[] to find a neutral course between the two Religion Clauses, which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." 397 U.S. at 668-69. As Justice Harlan put it, neutrality does not create "'so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation.'" *Id.* at 669 (quoting *Sherbert*, 374 U.S. at 422 (Harlan, J., dissenting)). Rather, it allows room to fashion greater protections "in the joints" between the federal Free Exercise and Establishment Clauses "productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.*

Similarly, this Court expanded religious liberty in *Corporation of the Presiding Bishop* v. *Amos*, 483 U.S. 327 (1987), by recognizing that there was room "in the joints" to allow religious institutions to consider religion in employment decisions pursuant to a statutory exemption for religious bodies. Specifically, the Court found that Congress's creation of an exemption in § 702 of the Civil Rights Act to allow religious organizations to make employment decisions on the basis of religion, even as

applied to the secular activities of those organizations, did not violate the Establishment Clause. As the Court opined, "'government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.'" *Id.* at 334. Indeed, Justice O'Connor expressly recognized that "government efforts to accommodate religion are permissible when they remove burdens on the free exercise of religion"—even where the Free Exercise Clause would not require their removal. *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 601 n.51 (1989) (citing *Amos*, 483 U.S. at 348 (O'Connor, J., concurring in judgment)).[14]

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[14] Congress has likewise repeatedly recognized room to legislate in the area between the federal Establishment and Free Exercise Clauses. The Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") provides greater free exercise protections for religious institutions' use of their land and buildings while avoiding the appearance of government endorsement of religion in violation of the Establishment Clause. 42 U.S.C. § 2000cc.

The States, moreover, have repeatedly used this breathing room to provide greater protections for religion than the Free Exercise Clause requires. For example, in *Humphrey* v. *Lane*, 728 N.E.2d 1039, 1045 (Ohio 2000), the Supreme Court of Ohio acknowledged that "the Ohio Constitution's free exercise protection is broader" than the federal Constitution in sustaining a free exercise challenge to State policy. Similarly, the Supreme Court of Alaska held that "a state court may provide greater protection to the free exercise of religion under the state constitution than is now provided under the United States Constitution," in rejecting the use of both the State and federal Free Exercise Clauses as a defense to charges of discrimination. *Swanner* v. *Anchorage Equal Rights Comm'n*, 874 P.2d 274, 280 (Alaska 1994). And, in *State* v. *Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990), the Minnesota Supreme Court protected the religious freedom of Amish drivers against general laws prohibiting slow-moving vehicles under the Minnesota Constitution, rather than under *Smith*. Moreover, a number of state Religious Freedom Restoration Acts, which apply the compelling interest test to neutral laws that impact religion, also rely on this important doctrine of "play in the joints" in providing greater protection than that required by the Free Exercise Clause. At least a dozen states have passed such laws in the last decade. *See, e.g.*, Ala. Const. amend. No. 622 (Alabama Religious Freedom Amendment); Ariz. Rev. Stat. § 41-1493 *et seq.*; Conn. Gen. Stat. § 52-571b; Fla. Stat. Ann. § 761.01 *et seq.*; Idaho Code tit. 73; 775 Ill. Comp. Stat. 35/1 *et seq.*; N.M. Stat. Ann. § 28-22-1 *et seq.*; Okla. Stat. tit. 51, § 251; 71 Pa. Cons. Stat. § 2401; R.I. Gen. Laws § 42-80.1-1 *et seq.*; S.C. Code Ann. § 1-32-10 *et seq.*; Tex. Civ. Prac. & Rem. Code Ann. § 110.001 *et seq.*

In short, the concept of "play in the joints" has been widely understood to refer to the room the States and Congress have to offer *protections* of free exercise above those mandated by the federal Free Exercise Clause—so long, of course, as they do not intrude into Establishment Clause limitations. The Court should reject the efforts by petitioners and their *amici* to turn that concept into a justification for governmental policies that restrict religious freedom and that, as in this case, plainly violate the Free Exercise Clause.

* * * *

A State has no obligation to fund the exercise of religious rights. However, once it has created and opened up a program to a broad cross-section of the public, it cannot then disqualify otherwise-qualified recipients simply because they, as a matter of private choice, would spend their aid in furtherance of a religious end. Such a denial of equal access on the basis of religion is flatly prohibited by the Free Exercise Clause.

CONCLUSION

For the foregoing reasons, as well as those set forth in respondent's brief, the decision below should be affirmed.

Respectfully submitted,

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September 8, 2003

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The Association of Southern Baptist Colleges and Schools ("ASBCS") is an incorporated entity formed to provide and maintain an organization through which educational institutions located in the territory of the United States and currently or historically cooperating with Southern Baptists may work together in promoting the interests of Christian education. ASBCS has approximately fifty-four (54) members, all of which are non-profit organizations formed for educational purposes.

The Association of Christian Schools International ("ACSI") is a nonprofit, non-denominational, religious association providing support services to more than 4,100 Christian preschools, and elementary and secondary schools in the United States. Services are also provided to more than 160 colleges and universities, including Northwest College, which Respondent Joshua Davey attended during his undergraduate work. ACSI has eleven offices in the United States. ACSI's headquarters and international office is located in Colorado Springs, Colorado.

Azusa Pacific University ("APU") has been developing disciples and scholars since 1899. It is a comprehensive Christian, evangelical university, dedicated to excellence in higher education, and to making a positive impact on society. The main campus is northeast of Los Angeles, with several other locations throughout California. Total student enrollment exceeds 6,800. APU offers more than 40 areas of undergraduate study, 19 master's degree programs, and four doctorates. Many of its students rely on government sponsored loans and grants to pay for their tuition and other educational expenses. APU thus has a strong interest in preventing state discrimination against religious individuals and entities in the distribution of government benefits.

Brigham Young University ("BYU") is an institution of higher education sponsored by the Church of Jesus Christ of Latter-Day Saints, and located in Provo, Utah. BYU is part of the Church's Church Educational System, which serves more than one million people worldwide through institutions of higher education, seminaries, elementary and secondary schools, and continuing education and literacy programs. BYU seeks to promote the rigorous study of secular, academic subjects, in light of and from the perspective of the restored gospel of Jesus Christ.

The Catholic University of America in Washington, D.C. is unique as the national university of the Catholic Church and the only higher education institution founded by the U.S. Bishops. Established in 1887 as a graduate and research center, Catholic University is the only U.S. university with ecclesiastical faculties granting canonical degrees in canon law, philosophy and theology. As a Catholic university, it desires to cultivate and impart an understanding of the Christian faith within the context of all forms of human inquiry and values. It seeks to provide a place for continuing reflection, in the light of Christian faith, upon the growing treasure of human knowledge. It is a private, coeducational research university with more than 150 master's and doctoral programs as well as an undergraduate program, offered in 11 schools and the Metropolitan College. Catholic University has 350 full-time faculty and more than 5,000 students.

Loma Linda University ("LLU") is a Seventh-day Adventist educational health-sciences institution with 3,000 students located in Southern California. LLU is comprised of seven schools and the Faculty of Religion. More than 55 programs are offered by the schools of Allied Health Professions, Dentistry, Medicine, Nursing, Pharmacy, Public Health, and the Graduate School. LLU offers curricula ranging from certificates of completion and associate in science degrees to doctor of philosophy and professional doctoral degrees.

Pepperdine University is an independent, private university committed to fostering academic excellence in the context of Christian values. The University formally affirms that "the educational process may not, with impunity, be divorced from the divine process." It has been recognized nationally for its excellent academic programs and enrolls approximately 8,000 full-time and part-time students in its five colleges and schools. With a full-time faculty of more than 300 professors and scholars, Pepperdine offers bachelor, master and doctoral studies in a wide range of disciplines.

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IN THE

Supreme Court of the United States

GARY LOCKE, *et al.*,
Petitioners,
v.
JOSHUA DAVEY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* THE BECKET FUND FOR RELIGIOUS LIBERTY, THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AND HISTORIANS AND LEGAL SCHOLARS IN SUPPORT OF RESPONDENT

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IN THE

Supreme Court of the United States

No. 02-1315

GARY LOCKE, *et al.*,
Petitioners,
v.
JOSHUA DAVEY,
Respondent.

BRIEF OF *AMICI CURIAE* THE BECKET FUND FOR RELIGIOUS LIBERTY, THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AND HISTORIANS AND LEGAL SCHOLARS IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICI*

The Becket Fund for Religious Liberty respectfully submits this brief of *amici curiae* on behalf of itself, the Catholic League for Religious and Civil Rights, and various historians and legal scholars in support of Respondent pursuant to Rule 37.3 of this Court.[1]

The Becket Fund for Religious Liberty is a bi-partisan, interfaith, public-interest law firm dedicated to protecting the free expression of all religious traditions and the equal participation of religious people in public life and public benefits. Accordingly, the Becket Fund has previously filed two *amicus* briefs before this Court regarding the history of the federal and state Blaine Amendments and has been actively involved in lower court litigation challenging state

[1] All parties have consented to the filing of this brief. A consent letter from Respondent is on file with the Court. A consent letter from Petitioners is being filed concurrently with this brief. No counsel for any party authored this brief in whole or in part. No person or entity other than *amici*, their members, and their counsel made any monetary contribution to the preparation or submission of this brief.

Blaine Amendments, including Washington's.[2]

The Catholic League for Religious and Civil Rights is the nation's largest Catholic civil-rights organization. The League's headquarters is in New York City; its cooperating affiliates across the Country assist in activities national in scope. The Catholic League aims – among other things – to expose and correct stereotypes of Catholic belief and of the Church in the media, in popular culture, and in government actions. In this way, the League seeks not only to promote accurate understanding of history, but also to protect individual Catholics as well as the Church against defamation and discrimination.

Amici also include several prominent legal and religious historians and legal scholars, whose names and institutional affiliations (for identification purposes only) are listed in Appendix A. Among these *amici* are authors of some of the leading – indeed, definitive – accounts of the social, historical, and religious context provided in this brief.[3] They have joined in this submission to ensure

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[2] *See* Brief of the Becket Fund for Religious Liberty as *Amicus Curiae* in Support of Petitioners (Nov. 9, 2001) (*Zelman v. Simmons-Harris,* Nos. 00-1751, 00-1777, 00-1779) (available at www.becketfund.org/litigate/zelmanamicus.pdf); Brief of the Becket Fund for Religious Liberty as *Amicus Curiae* in Support of Petitioners (Aug. 19, 1999) (*Mitchell v. Helms,* No. 98-1648) (available at www.becketfund.org/litigate/mitchell.pdf). *See also* Brief *Amicus Curiae* of the Becket Fund for Religious Liberty in Support of Reversal (Apr. 12, 2001) (*Gallwey v. Grimm,* Wash. S. Ct. No. 68565-7) (available at www.becketfund.org/ litigate/gallweyamicus.pdf); *Pucket v. Rounds,* (D.S.D. filed Apr. 23, 2003); *Boyette v. Galvin,* No. 98-CV-10377 (D. Mass. filed Mar. 3, 1998).

[3] *See, e.g.,* GERARD BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA (1987); THOMAS E. BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA: 1776-1787 (1977); CHARLES L. GLENN, THE MYTH OF THE COMMON SCHOOL (2002); PHILIP JENKINS, THE NEW ANTI-CATHOLICISM: THE LAST ACCEPTABLE PREJUDICE (2003); GEORGE M. MARSDEN, RELIGION AND AMERICAN CULTURE (2000); WARD M. MCAFEE, RELIGION, RACE, AND RECONSTRUCTION: THE PUBLIC SCHOOL IN THE POLITICS OF THE 1870'S (1998); JOHN T. MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM (2003); WILLIAM G. ROSS, FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION 1917-1927 (1994); JOSEPH

that the Court's analysis proceeds from, and is built upon, historically accurate premises and accounts. In particular, the goal of these historians and scholars is to urge the Court not to embrace the misleading and incomplete revisionist account, supplied by several of Petitioners' *amici,* of the Blaine Amendments and of America's experiences with nativism and anti-Catholicism.

SUMMARY OF THE ARGUMENT

The Washington State law at issue in this case disqualifies a student from an otherwise available government benefit, only because the student would use the benefit for a religious purpose. That is the core constitutional offense identified by the court below, and this Court may affirm on that basis alone.

But laws that single out the religious generally – or those of a particular religion – for exclusion from government educational benefits are widespread in this country and share a common and pernicious heritage. Though this tradition of religious discrimination is unfortunately long-standing, it does not originate with James Madison, Thomas Jefferson, or any other framers of the federal constitution. Instead, it emerged with force about a half-century later as part of a broader cultural movement reacting against a growing religious minority, whose controversial beliefs directly threatened the dominant religious ideology of the day. American nativism succeeded not only in backing its hostility to Catholic immigrants (and especially their schools) with the force of law, but in cloaking that hostility with the rhetoric of religious freedom and the authority of the founders. *See generally* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (Harvard 2002).

This perversion of the great American tradition of religious freedom must end now. This case presents the Court with the opportunity to expose it and condemn it, once and for all – to tear out, root and branch, the state constitutional provisions that have enforced religious discrimination in the funding of education for well over a century.

P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY (1999); JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES (1999).

Two *amicus curiae* briefs in support of Petitioners represent what should be the last gasps of this dying tradition. The first asks the Court to cast aside the historical conclusions of a majority of its sitting members – and the broad consensus of historians and legal scholars – regarding the nativist purpose of the federal Blaine Amendment, and its state forerunners and progeny, including the Washington Blaine Amendment. The second brief freely acknowledges that hostility to certain Catholic beliefs animated the Blaine Amendments but – astonishingly – asks this Court to legitimize that hostility. As set forth below, both arguments are untenable and should be rejected.

ARGUMENT

I. THE ORIGINAL BLAINE AMENDMENT AND ITS STATE-LEVEL PROGENY, INCLUDING THE WASHINGTON PROVISION AT ISSUE HERE, WERE ANIMATED BY RELIGION-BASED HOSTILITY AND FEAR.

A. The Decisions of This Court Establish Conclusively That the Federal and State Blaine Amendments Were Animated by Nativism.

Seven Justices now sitting on this Court have already acknowledged that nativism was the driving force behind both the federal Blaine Amendment and its state progeny. That acknowledgement has come in two different opinions in two different cases, and those opinions suggest different views of the *legal consequences* of that historical fact. But the underlying history has nonetheless been acknowledged by a majority of this Court, and so is already established in its jurisprudence.

In *Mitchell v. Helms,* 530 U.S. 793 (2000), the four Justice plurality opinion both acknowledged and condemned the nativism that led to the federal and state Blaine Amendments. *See id.* at 828-29 (plurality opinion of Thomas, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.). In rejecting the Court's prior use of the term "sectarian" in Establishment Clause jurisprudence, the opinion explained that "hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow." The opinion

continued:

> Opposition to aid to "sectarian" schools acquired prominence in the 1870s with Congress' consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that "sectarian" was code for "Catholic." *See generally* Green, *The Blaine Amendment Reconsidered,* 36 Am. J. Legal Hist. 38 (1992).

Mitchell, 530 U.S. at 828. The plurality concluded that "the exclusion of pervasively sectarian schools from otherwise permissible aid programs" – precisely the purpose and effect of the Blaine Amendments – represented a "doctrine, born of bigotry, [that] should be buried now." *Id.* at 829.

Two years later, in *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002), three Justices provided a detailed account of the relevant history in dissent. *See id.* at 720-21 (dissenting opinion of Breyer, J., joined by Stevens and Souter, JJ.). Specifically, they recognized that the Blaine Amendment movement was a form of backlash against "political efforts to right the wrong of discrimination against religious minorities in public education." *Id.* at 721.

> [H]istorians point out that during the early years of the Republic, American schools – including the first public schools – were Protestant in character. Their students recited Protestant prayers, read the King James version of the Bible, and learned Protestant religious ideals. *See, e.g.,* D. Tyack, *Onward Christian Soldiers: Religion in the American Common School, in History and Education* 217-226 (P. Nash ed. 1970). Those practices may have wrongly discriminated against members of minority religions, but given the small number of such individuals, the teaching of Protestant religions in schools did not threaten serious social conflict. *See* Kosmin & Lachman, [*One Nation Under God: Religion in Contemporary American Society*] 45 [(1993)] (Catholics constituted less than 2% of American church-affiliated population at time of founding).

Zelman, 536 U.S. at 720. The Justices recounted how the wave of Catholic and Jewish immigration starting in the mid-19th Century increased the number of those suffering from this discrimination, and so the intensity of religious hostility surrounding the "School Question":

> Not surprisingly, with this increase in numbers, members of non-Protestant religions, particularly Catholics, began to resist the Protestant domination of the public schools. Scholars report that by the mid-19th century religious conflict over matters such as Bible reading "grew intense," as Catholics resisted and Protestants fought back to preserve their domination. Jeffries & Ryan, [*A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279,] 300 [(Nov. 2001)]. "Dreading Catholic domination," native Protestants "terrorized Catholics." P. Hamburger, *Separation of Church and State* 219 (2002). In some States "Catholic students suffered beatings or expulsions for refusing to read from the Protestant Bible, and crowds ... rioted over whether Catholic children could be released from the classroom during Bible reading." Jeffries & Ryan, 100 Mich. L. Rev., at 300.

Zelman, 536 U.S. at 720-21. Finally, the Justices detailed how Catholic efforts to correct this increasingly severe discrimination elicited a reaction in the form of the proposed federal Blaine Amendment and its successful state progeny:

> Catholics sought equal government support for the education of their children in the form of aid for private Catholic schools. But the "Protestant position" on this matter, scholars report, "was that public schools must be 'nonsectarian' (which was usually understood to allow Bible reading and other Protestant observances) and public money must not support 'sectarian' schools (which in practical terms meant Catholic.)" [Jeffries & Ryan] at 301. And this sentiment played a significant role in creating a movement that sought to amend several state constitutions (often successfully), and to amend the United States Constitution (unsuccessfully) to make certain that government would not help pay for "sectarian" (*i.e.*, Catholic) schooling for children. [Jeffries & Ryan] at 301-305. *See also*

Hamburger, *supra*, at 287.

Zelman, 536 U.S. at 721.

Thus, according to seven Justices of this Court, the federal and state Blaine Amendments excluded "sectarian" schools from equal participation in government educational funding as a way to target for special disadvantage Catholics and other growing religious minorities, in fearful reaction to their refusal to conform with "nonsectarian" Protestantism.

To be sure, the plurality in *Mitchell* and the dissent in *Zelman* disagree sharply on the *legal consequences* of this history. The *Mitchell* plurality concluded that, because the exclusion of "sectarian" schools from government funding originated in the same hostility to Catholics expressed in the Blaine Amendments, and because that exclusion continues to impose special disadvantages on Catholics even to this day, the exclusion is unconstitutional and should be repudiated. *See Mitchell,* 530 U.S. at 829. *See also Hunter v. Underwood,* 471 U.S. 222 (1985). The *Zelman* dissent concluded that, although the Blaine Amendments' exclusion of "sectarian" schools from government funding targeted Catholics in reaction to their refusal to assimilate, and although that exclusion may have been discriminatory, Catholics' resistance to that discrimination represented religious strife that demonstrates the need to deny government funding to all religious schools. *Zelman,* 536 U.S. at 721-23. *See also* Lupu & Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles,* 78 NOTRE DAME L. REV. 917, 954-55 & n.170 (May 2003) (discussing historical conclusions in Breyer dissent).

But disagreement on the *legal consequences* of the underlying history does not alter the fact that a solid majority has agreed on the underlying history. Notwithstanding other differences, it remains that seven Justices agree that by excluding "sectarian" schools from government funding, the federal and state Blaine Amendments were designed to exclude Catholic and other religious minority schools, and that this targeting came in hostile reaction to their growing numbers and resistance to Protestant hegemony. Therefore, these historical conclusions should not be disrupted.

B. A Large and Growing Historical Record Establishes Conclusively That the Federal and State Blaine Amendments Were Animated by Nativism.

The recent historical conclusions of this Court merely summarize a long-established but growing historical record documenting the pervasive role of nativism in debates over the "School Question" in the United States. As set forth more fully below, the "common schools" were founded in substantial part to promote the teaching of – and to entrench the dominant position of – the "common religion" of "nonsectarian" Protestantism. When Catholics and other religious minorities threatened that dominance by growing in numbers and resisting religious assimilation, the result was a nativist movement that urged the passage of laws – including the federal Blaine Amendment and similar state laws that targeted "sectarian" schools for special disadvantage – to enforce the movement's hostility to these religious newcomers. Washington State's constitutional exclusion of "sectarian" schools from government educational funding is a classic example.

1. Nineteenth Century "Common Schools" Inculcated the Protestant "Common Religion," Thus Distinguishing Themselves from "Sectarian" Schools.

In the Northeastern States, the birthplace of the "common school," there was an ongoing religious debate in the 19th Century between the Unitarian and Trinitarian divisions of the Congregational faith. *See, e.g., Hale v. Everett*, 53 N.H. 9, 111 (1868) ("the great mass of our people . . . were Congregationalists . . . . Such was their Christianity and their Protestantism, as was that of most of the New England states"). *See also The Dublin Case*, 38 N.H. 459 (1859) (describing history of the Congregational Church and conflicts between the Unitarians and Trinitarian/Orthodox in New England). A desire to make peace between these factions, together with the emerging principle of universal education, led to the creation of "nonsectarian common schools," first in Massachusetts and then elsewhere.

But "nonsectarian" in this sense did not mean nonreligious. The term referred to schools that taught religious doctrine acceptable

initially to all Congregationalists, and, later, to most Protestants.[4] When Horace Mann developed his system of common, nonsectarian schools, the conflict he addressed was that between Trinitarian and Unitarian Congregationalists.[5] E.I.F. WILLIAMS, HORACE MANN: EDUCATIONAL STATESMAN 266 (1937); *see also* R. MICHAELSEN, PIETY IN THE PUBLIC SCHOOL 69 (1970) ("Horace Mann scorned sectarianism. By that he meant chiefly the sectarianism of the evangelical Protestant denominations.").

Indeed, during this period, the Justices of this Court defined "sectarian" in relation to a benchmark of nondenominational Protestantism. In *Vidal v. Girard's Ex'rs*, 43 U.S. 127 (1844), Justice Story asked rhetorically, in response to the assertion that Christianity could not to be taught by laymen in a college:

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[4] "Our fathers were not only Christians; they were, even in Maryland by a vast majority, elsewhere almost unanimously, Protestants." *Hale*, 53 N.H. at 111 (quoting 2 Bancroft's Hist. U.S. 456). *See also Stevenson v. Hanyon*, 7 Pa. Dist. R. 585, 589 (1898) ("Christianity is part of the common law of this State [Pennsylvania]"); *Warde v. Manchester*, 56 N.H. 508, 509 (1876) ("[T]he protestant religion is regarded with peculiar favor . . . .").

[5] Responding to the charges that he sought the removal of religion, and the Bible in particular, from the common schools, Mann issued a statement on "Religious Education" in his Report on Education for 1848:

> But it will be said that this grand result in practical morals is a consummation of blessedness that can never be attained without religion, and that no community will ever be religious without a religious education. Both these propositions I regard as eternal and immutable truths.

HORACE MANN, LIFE AND WORKS: ANNUAL REPORTS OF THE SECRETARY OF THE BOARD OF EDUCATION OF MASSACHUSETTS FOR THE YEARS 1845-1848, at 292 (1891). Thus, the "Father of Public Education" himself vehemently denied that he "ever attempted to exclude religious instruction from school, or to exclude the Bible from school, or to impair the force of that volume." *Id.* at 311. Instead, he describes the public school system at that time as building "its morals on the basis of religion; it welcomes the religion of the Bible." *Id.* Mann welcomed religion in the common schools—so long as it was of the "common," "non-sectarian" variety.

> Why may not the Bible, and especially the New Testament, without note or comment, be read and taught as a divine revelation in the college—its general precepts expounded, its evidences explained, and its glorious principles of morality inculcated? What is there to prevent a work, *not sectarian,* upon the general evidence of Christianity, from being read and taught in the college by lay-teachers? . . . . Where can the purest principles of morality be learned so clearly or so perfectly as from the New Testament?

Id. at 200 (emphasis added). Thus, even this Court took for granted the proposition that, in 1844, the "common religion" was not sectarian. Other religions were.

2. Nativist Hostility to European Immigrants and Their Religions Produced Fierce, Organized Opposition to "Sectarian" Schools, Culminating in the Movement to Pass the Federal and State Blaine Amendments.

Between 1830 and 1870, the common-school movement coincided with a surge in Irish, German, and other European Catholic and Jewish immigrants, and a corresponding backlash – one that lasted well into the 20th Century – against those immigrants and their religions. This backlash formed the basis of organized nativist movements that thrived on Protestant fears of the immigrants' cultures and faiths, and that expressed their hostility in law, including the Blaine Amendments.

One of the earliest and most prominent nativist groups was the Know-Nothing party, which "included in its platform daily Bible reading in the schools." *Lemon v. Kurtzman*, 403 U.S. 602,629 (1971) (citation omitted). Abraham Lincoln wrote of that party:

> As a nation we began by declaring that 'all men are created equal.' We now practically read it, 'all men are created equal, except Negroes.' When the Know-Nothings get control, it will read 'all men are created equal except Negroes and foreigners and Catholics.' When it comes to this, I shall prefer emigrating to some country where they make no pretense of loving liberty.

Letter from Abraham Lincoln to Joshua Speed (Aug. 24, 1855), *reprinted in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 320, 323 (R. Basler ed., 1953).

This was not a fringe movement. In Massachusetts, the Know-Nothing party swept the elections of 1854, gaining the governorship, the entire congressional delegation, all forty seats in the Senate, and all but 3 of the 379 members of the House of Representatives. JOHN R. MULKERN, THE KNOW-NOTHING PARTY IN MASSACHUSETTS 76 (1990). Armed with this overwhelming mandate, they turned quickly to what Governor Henry J. Gardner called the mission to "Americanize America." *Id.* at 94. The Know-Nothings required the reading of the King James Bible in all "common" schools; they proposed constitutional amendments (which passed both houses of the legislature) that "would have deprived Roman Catholics of their right to hold public office and restricted office and the suffrage to male citizens who had resided in the country for no less than twenty-one years"; they dismissed Irish state-government workers; and they banned foreign-language instruction in the public schools. *Id.* at 102. The official bigotry is perhaps best—and comically—illustrated by the removal of a Latin inscription above the House Speaker's desk, and the establishment by the legislature of a "Joint Special Committee on the Inspection of Nunneries and Convents." *Id.* at 102-103. This Committee was charged with liberating women thought to be captive in convents and stamping out other "acts of villainy, injustice, and wrong . . . perpetrated with impunity within the walls of said institutions." *Id.* at 103.

Of particular interest here is the fact that the Know-Nothings succeeded in adding an amendment to the Massachusetts Constitution which had been proposed and narrowly rejected by the people one year before: "[M]oneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the state for the support of common schools . . . shall never be appropriated to any religious sect for the maintenance exclusively of its own schools." MASS. CONST. amend. art. XVIII (superseded by MASS. CONST. amend. art. XLVI). *See* MULKERN, at 54-56, 79, 105-106. The amendment's proponents were open about their motives. *See, e.g.,* OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION ASSEMBLED MAY 4, 1853

TO REVISE AND AMEND THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS, Vol. II, at 630 ("[I]f gentlemen say that the resolution has a strong leaning towards the Catholics, and is intended to have special reference to them, I am not disposed to deny that it admits of such interpretation.") (Mr. Lothrop).

Nor were nativist sentiments and outbursts confined to Massachusetts. The understanding of "nonsectarianism" as "lowest common denominator" Protestantism also led, for example, to a telling battle in Cincinnati between the "common religionists" and a group of Catholics, Jews, and freethinkers that opposed Protestant devotional Bible reading. *See Board of Educ. v. Minor*, 23 Ohio St. 211 (1872). Protestant opposition to the removal of "their" Bible from the public schools was fierce and virulently anti-Catholic. *See* MICHAELSEN, *supra*, at 118 ("[T]he Dutch Reformed *Christian Intelligencer* denounced the Cincinnati board's action as a move to 'hand the public schools over to Pope, Pagan, and Satan.'").

Resistance to religious assimilation through the "common schools" gave rise to a similarly hostile reaction elsewhere as well, including deadly riots in Philadelphia, where nativist mobs burned Catholics' homes, churches and seminaries. JOHN T. MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM 40 (Norton 2003); MARTIN E. MARTY, PILGRIMS IN THEIR OWN LAND: 500 YEARS OF RELIGION IN AMERICA 275-76 (Penguin 1985).

The tax-funded public schools were the weapon of choice for nativists in New York City as well. *See Lemon,* 403 U.S. at 628 (Douglas, J., concurring) ("Early in the 19th century the Protestants obtained control of the New York school system and used it to promote reading and teaching of the Scriptures as revealed in the King James version of the Bible."); MICHAELSEN at 85 ("But in certain practices – such as the use of the King James version of the Bible and certain other literature – the society gave a definite Protestant and even anti-Catholic tone to education under its direction."); DIANE RAVITCH, THE GREAT SCHOOL WARS: NEW YORK CITY, 1805-1973, at 50-52 (1974). Resistance again gave rise to conflict, but Bishop John Hughes stationed armed men around churches to avoid losses similar to those in Philadelphia. *See* MARTY, at 276.

Soon enough, the movement to exclude Catholics from educational funding using the legal term "sectarian" appeared on the national stage in the form of the federal "Blaine Amendment." Blaine Amendments take their name from Representative James G. Blaine, who in 1875, introduced in the U.S. House of Representatives a proposed constitutional amendment that would have barred states from giving school funds to "sectarian" schools.[6] Although the Blaine language narrowly failed as a federal constitutional amendment,[7] it had gained enough support that Congress thereafter required new states – including Washington State – to adopt similar language in their state constitutions as a condition of admittance to the Union.[8] Other states voluntarily adopted constitutional

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[6] LLOYD JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925, at 138-139 (1987). The amendment read:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

Id.

[7] The measure passed in the House by a margin of 180-7, 4 CONG. REC. 5191 (1876), but fell four votes short of a supermajority in the Senate. 4 CONG. REC. 5595 (1876).

[8] *See, e.g.*, Act of Feb. 22, 1889, 25 Stat. 676, ch. 180 (1889) (enabling act for North Dakota, Montana, South Dakota, and Washington); Act of June 20, 1910, 36 Stat. 557 § 26 (1910) (enabling act for Arizona and New Mexico); Act of July 3, 1890, 26 Stat. 215 § 8, ch. 656 (1890) (enabling act for Idaho); S.D. CONST. art. VIII § 16; N.D. CONST. art. 8 § 5; MONT. CONST. art. X § 6; WASH. CONST. art. IX § 4, art. I § 11; ARIZ. CONST. art. IX § 10; IDAHO CONST. art. X § 5. *See also* 20 CONG. REC. 2100-01 (1889) (statement of Sen. Blair) (arguing in favor of Enabling Act requirement that state constitutions guarantee "public schools . . . free from sectarian control," in part because requirement would accomplish purposes of failed federal Blaine Amendment). The fact that a Blaine Amendment was effectively forced on the State of Washington lends an especially hollow ring to the Petitioners' and various *amici's* repeated expressions of concern over "federalism" and "play in the joints." *See* Conklin & Vaché, at 441-42

amendments containing similar language as part of the same movement.[9] *See* HAMBURGER, at 335 ("Nativist Protestants also failed to obtain a federal constitutional amendment but, because of the strength of anti-Catholic feeling, managed to secure local versions of the Blaine amendment in the vast majority of the states."); VITERITTI, at 153. *See also* Stephen K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 43 (1992) (by 1876 fourteen states had enacted legislation prohibiting the use of public school funds for religious schools; by 1890 twenty-nine states had adopted constitutional requirements along the same lines).

Many prominent people threw their weight behind the effort. Calling for an end to all funding for "sectarian" schools in 1875, President Grant referred to the Catholic Church as a source of "superstition, ambition and ignorance." President Ulysses S. Grant, Address to the Army of Tennessee at Des Moines, Iowa (quoted in Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 51 (1997)). *See* MCGREEVY, at 91-92 (discussing importance of Grant's speech launching federal Blaine Amendment); VITERITTI, at 152-53 (same).

Institutions were formed to fight Catholic interference with the Protestant public school system. *See, e.g., Derry Council, No. 40, Junior Order United American Mechanics v. State Council of Penn.*, 47 A. 208, 209 (Pa. 1900) (among purposes of the Junior Order of United American Mechanics were "to maintain the public-school system of the United States, and to prevent sectarian interference therewith; to uphold the reading of the Holy Bible therein"). A succession of anti-Catholic organizations continued efforts to oppose Catholic education and influence using the various tools of the state legislature, Congress, and the judiciary. In the 1890s, the "American Protective Association" was politically successful in inciting anti-

(concluding that "realistically, there was no choice" for citizens of Washington whether to include some form of the Blaine Amendment).

[9] *See, e.g.*, N.Y. CONST. art. XI § 3 (adopted 1894); DEL. CONST. art. X § 3 (adopted 1897); KY. CONST. § 189 (adopted 1891); MO. CONST. art. IX § 8 (adopted 1875).

Catholic hatred.[10]

3. Early Judicial Interpretations of the Various State Blaine Amendments Confirmed and Effectuated Their Nativist Purpose.

Early litigation under the Blaine Amendments should remove any doubt that, by excluding "sectarian" schools from government funding, the amendments were meant to target Catholics and other religious newcomers for special disfavor. State Blaine Amendments and similar provisions were frequently used to strike down programs such as payment for orphans at a Catholic asylum, *Nevada ex rel. Nevada Orphan Asylum v. Hallock*, 16 Nev. 373 (1882), payment for tuition at an "industrial school for girls," *Cook Cy. v. Chicago Indus. Sch. for Girls*, 18 N.E. 183 (Ill. 1888), and provision of textbooks and other supplies for parochial school students, *Smith v. Donahue*, 195 N.Y.S. 715 (N.Y. App. Div. 1922).

When Catholic children attending public schools complained about the Protestant doctrine taught there, their charges went unanswered by the courts. While the Catholic Church forbade its faithful from reading the King James version of the Bible,[11] courts

[10] Oath No. Four of the APA began:

> I do most solemnly promise and swear that I will always, to the utmost of my ability, labor, plead and wage a continuous warfare against ignorance and fanaticism; that I will use my utmost power to strike the shackles and chains of blind obedience to the Roman Catholic Church from the hampered and bound consciences of a priest-ridden and church-oppressed people; that I will never allow any one, a member of the Roman Catholic Church, to become a member of this order, I knowing him to be such; that I will use my influence to promote the interest of all Protestants everywhere in the world that I may be; that I will not employ a Roman Catholic in any capacity if I can procure the services of a Protestant.

HUMPHREY J. DESMOND, THE A.P.A. MOVEMENT, A SKETCH 36 (1912); *See also* DONALD L. KINZER, AN EPISODE IN ANTI-CATHOLICISM 139 (1964).

[11] As the California Supreme Court described the religious differences between the King James (Protestant) and Douai (Catholic) versions of the Bible:

continued to hold that the reading of that translation was *not* sectarian instruction. *See People ex rel. Vollmar v. Stanley*, 255 P. 610, 617 (Colo. 1927) ("It is said that the King James Bible is proscribed by Roman Catholic authority; but proscription cannot make that sectarian which is not actually so."), *overruled by Conrad v. City of Denver*, 656 P.2d 662 (Colo. 1983).

Other courts were more candid about their intent to keep Protestant religious instruction in the public schools, and "sectarian" ideas out. After rejecting a claim under the state's Blaine Amendment challenging Bible reading and prayer in public school, the Iowa Supreme Court suggested that "the plaintiff is a propagandist, and regards himself charged with a mission to destroy the influence of the Bible." *Moore v. Monroe*, 20 N.W. 475, 475-76 (Iowa 1884). But in a later decision, the same court found a constitutional violation where a school district provided funds to a public school operating in the same building as a Catholic parochial school. *Knowlton v. Baumhover,* 166 N.W. 202, 214 (Iowa 1918). *See also Kaplan v. Indep. Sch. Dist.*, 214 N.W. 18, 20 (Minn. 1927) (upholding Bible reading, and adding, "[w]e are not concerned with nice distinctions between sects, nor as to how among them the different authorized versions of the Bible are regarded."); *Nevada ex rel. Nevada Orphan Asylum v. Hallock*, 16 Nev. 373, 385 (1882) ("The framers of the [Nevada] constitution undoubtedly considered the Roman Catholic a sectarian church."). *Cf. Donohoe v. Richards,* 38 Me. 379 (1854) (affirming dismissal of lawsuit by 15-year old girl expelled from public school for refusing to read the King James Version, noting that "[l]arge masses of foreign people are among us . . [who must] imbibe the liberal spirit of our laws and institutions," and concluding that "the process of assimilation [cannot] be so readily and thoroughly accomplished as through the medium of the public schools.").

The Douai version is based upon the text of the Latin Vulgate, the King James version on the Hebrew and Greek texts. There are variances in the rendering of certain phrases and passages. The Douai version incorporates the Apocrypha, which are omitted from the texts of the Testaments in the King James version.

Evans v. Selma Union High School Dist., 222 P. 801, 802-03 (Cal. 1924). *See also State ex rel. Finger v. Weedman,* 226 N.W. 348, 350-53 (S.D. 1929) (discussing conflict between Catholics and Protestants over Bible reading); *People ex rel. Ring v. Board of Educ. of Dist. 24,* 92 N.E. 251, 254 (Ill. 1910) ("Catholics claim that there are cases of willful perversion of the Scriptures in King James' translation.").

The claims of a group of Catholics and Jews against a public school board that conducted religious exercises, including the reading of the King James Bible and recitation of the Lord's Prayer, were dismissed when the Texas Supreme Court held that such exercises did not render the school sectarian. *Church v. Bullock*, 109 S.W. 115, 118 (Tex. 1908) ("Christianity is so interwoven with the web and woof of the state government that to sustain the contention that the Constitution prohibits reading the Bible, offering prayers, or singing songs of a religious character in any public building of the government would produce a condition bordering upon moral anarchy.").

The Kansas Supreme Court held that the reading of the Lord's Prayer and the Twenty-Third Psalm did not constitute "sectarian or religious doctrine," arguing that the public schools had an obligation to teach morals and ideals to its students, and "the noblest ideals of moral character are found in the Bible." *Billard v. Board of Educ.*, 76 P. 422, 423 (Kan. 1904).

Similarly, daily religious services at a Methodist College were held by the Kentucky Court of Appeals not to constitute "sectarian instruction." *Commonwealth v. Board of Educ. of Methodist Episcopal Church*, 179 S.W. 596, 598 (Ky. 1915). *See also Hackett v. Brooksville Graded Sch. Dist.*, 87 S.W. 792, 793 (Ky. 1905).

The Nebraska courts also applied the term "sectarian" to allow Protestant instruction in the public schools. *See State v. Scheve*, 93 N.W. 169, 172 (Neb. 1903) (overruling motion for rehearing) (constitutional prohibition against sectarian instruction "cannot, under any canon of construction with which we are acquainted, be held to mean that neither the Bible, nor any part of it, from Genesis to the Revelation, may be read in the educational institutions fostered by the state."); *Tash v. Ludden*, 129 N.W. 417, 421 (Neb. 1911) ("This is a Christian country, Nebraska is a Christian state, and its normal schools are Christian schools; *not sectarian*, nor

what would be termed religious schools; . . . .") (emphasis added).

At the same time, objecting students were not excused from "nonsectarian" religious exercises. *See, e.g.*, *McCormick v. Burt*, 95 Ill. 263 (1880) (affirming judgment against Catholic plaintiff who was suspended for not observing Bible reading rule); *Spiller v. Inhabitants of Woburn*, 12 Allen 127 (Mass. 1866) (upholding student's "exclusion" from school for refusing to bow her head during public school prayer). *Cf. North v. Board of Trustees of Univ. of Illinois*, 27 N.E. 54 (Ill. 1891) (holding that mandatory chapel exercises, the avoidance of which resulted in the expulsion of the plaintiff from the State university, did not violate the Illinois constitution).

This pattern of application serves only to confirm what the language and history of the Blaine Amendments already make clear: that the term "sectarian" was code for "Catholic," and that laws excluding "sectarian" schools and their students from government benefits – like the federal and state Blaine Amendments – were designed to target Catholics for special disfavor.

4. Washington's Blaine Amendment Is Typical of State Laws That Target "Sectarian" Religious Groups for Special Disfavor.

The Washington Constitution is no exception to the broader pattern of state constitutions containing provisions designed specially to disadvantage Catholics in the area of education. The Washington Blaine Amendment, like the federal Enabling Act that required it, contains the tell-tale "sectarian" category that was characteristic of Blaine Amendments nationwide.[12] Even on its face, the term

[12] *Compare* WASH. CONST. art. IX § 4 ("All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence."), *with* Act of Feb. 22, 1889, 25 Stat. 676, ch. 180 (1889) (requiring Washington to maintain "public schools … free from sectarian control"), *and with* 4 CONG. REC. 205 (1875) ("no money raised by taxation in any State for the support of schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect"). *See also* VITERITTI, at 152-53 ("The Washington Constitution is a direct descendent of the Blaine Amendment."); Utter & Larson, 15 HASTINGS CONST. L.Q. at 468 ("The language of the

"sectarian" connotes fewer than all religious groups as its target, and the long history of its usage since the mid-19th Century (as discussed at length above) clarifies that Catholics were especially targeted.

Moreover, the only documentation of state-level debates over the Washington Blaine Amendment reinforces the conclusion that it was passed for an illicit purpose. Specifically, the framers of Article IX, Section 4 considered and rejected both replacing the term "sectarian" with the term "religious," and excluding "religious exercises or instructions" entirely from public schools. THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889, at 329, 689 (B. Rosenow ed. 1999). Thus, the framers followed the consistent pattern of preserving "nonsectarian" Protestant worship in government funded schools, while denying that same funding to unnamed – but well-known – "sectarian" groups. *See* Utter & Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 HASTINGS CONST. L.Q. 451, 478 (1988) ("In distinguishing between religion and sectarianism, the framers [of art. IX § 4] comported with the fifty-year-old common school movement . . . [which] was natural for a convention dominated by Blaine Republicans and influenced by the Enabling Act's public school provisions."). *See also* Frank J. Conklin and James M. Vaché, *The Establishment Clause and the Free Exercise Clause of the Washington Constitution – A Proposal to the Supreme Court*, 8 UNIV. PUGET SOUND L. REV. 411, 436-40 (1985) (discussing "convergence of anti-Mormon and anti-Catholic sentiment in the Washington Constitution").

Thus, Washington State's Blaine Amendment, like its failed federal predecessor, targets "sectarian" instruction for exclusion from government educational funding in order to entrench "nonsectarian" Protestantism and to hobble its competitors, especially Catholicism.

state constitution's establishment clauses is similar to that found in the Blaine Amendment."); Katie Hosford, *The Search for a Distinct Religious-Liberty Jurisprudence Under the Washington State Constitution*, 75 WASH. L. REV. 643, 650 (2000) ("[T]he Washington Constitution's religion provisions derive from essentially the same intentions as those behind the Blaine and Blair proposed amendments to the U.S. Constitution.").

C. The Grossly Incomplete Historical Account of Certain *Amici* Does Nothing to Undermine the Conclusion that Nativism Animated the Federal and State Blaine Amendments.

Certain *amici* labor mightily to avoid or obfuscate these basic historical propositions. *See generally* Brief *Amicus Curiae* of Historians and Law Scholars on Behalf of Petitioners (hereinafter "Americans United Br." or the "Brief").[13] For the reasons set forth below, this Court should reject both the overall approach and particular arguments of the Brief.

1. *Amici's* Competing Account Is Marked by Glaring Omissions.

Before addressing its particular arguments, present *amici* note a series of large-scale oversights in the Brief. First, it completely ignores the fact that seven Justices have already accepted the basic historical propositions that it would challenge. *See supra* Section I.A. It makes no mention of the *Zelman* dissent and states inaccurately that the *Mitchell* plurality reached its conclusions "without the benefit of briefing on this subject." Americans United Br. at 4. *But see* Brief of the Becket Fund for Religious Liberty as *Amicus Curiae* in Support of Petitioners (filed in *Mitchell v. Helms,* No. 98-1648, Aug. 19, 1999) (available at www.becketfund.org/litigate/mitchell.pdf).

Second, the Brief either ignores entirely or gives short shrift to the recent historical works that confirm – and, in some cases, have already informed – the conclusions of this Court regarding the prominent role of nativism in disputes over school funding. *See, e.g.,*

[13] Although Americans United for Separation of Church and State ("AU") funded the brief of "Historians and Law Scholars," and although counsel of record on the brief was AU's General Counsel from 1992 to 2001, AU is not listed as an *amicus*. *See* Americans United Br. 1 n.1. Present *amici* note that the when AU was founded in 1947, its original name was Protestants and Other Americans United for Separation of Church and State, and that one of its attorneys was the notorious anti-Catholic polemicist Paul Blanshard. *See* PHILIP JENKINS, THE NEW ANTI-CATHOLICISM: THE LAST ACCEPTABLE PREJUDICE 39 (2003). *See also* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 451-52, 470-72 (2003).

PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (Harvard 2002); JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY (Brookings 1999); CHARLES L. GLENN, JR., THE MYTH OF THE COMMON SCHOOL (U. Mass. 1988); WARD M. MCAFEE, RELIGION, RACE AND RECONSTRUCTION: THE PUBLIC SCHOOL IN THE POLITICS OF THE 1870S (S.U.N.Y. 1998); Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J. L. & PUB. POL'Y 551 (Spring 2003); John Jeffries & James Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (Nov. 2001); Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117 (2000). *See also* PHILIP JENKINS, THE NEW ANTI-CATHOLICISM: THE LAST ACCEPTABLE PREJUDICE (Oxford 2003); JOHN T. MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM (Norton 2003). *But see* Americans United Br. at 4 n.3, 18 n.47 (citing briefly but otherwise ignoring books by Hamburger, Viteritti, and Glenn).

Third, the Brief takes no account of the history of application and judicial interpretation of the state Blaine Amendments. *See supra* Section I.B.3. This evidence – which remains wholly unanswered – serves only to confirm that by excluding "sectarians" from government educational funding, the amendments sought mainly to exclude Catholics.

2. *Amici's* Competing Account Is Inconsistent in Its Treatment of Remarks by Individuals.

The Brief alternately places too much and too little emphasis on the comments of individuals in assessing the purpose of the Blaine Amendments. A single remark by an individual, *by itself,* typically has little evidentiary value in proving the existence of a broader cultural or legal trend that animates a law. *See* Americans United Br. 28 n.76 (quoting *United States v. O'Brien,* 391 U.S. 367, 384 (1968)). But individual statements may serve to confirm the existence of those motivating trends *when combined* with other competent evidence. *See Church of Lukumi Babalu Aye v. Hialeah,* 508 U.S. 520, 540 (1993) ("Relevant evidence [for determining the object of a law] includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the

enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.") (citing *Arlington Heights v. Metro. Housing Devel. Corp.*, 429 U.S. 252, 267-68 (1977)). But the Brief has it exactly backwards: it diminishes hostile remarks when they comport with other evidence of broader trends and motives, but highlights remarks (or their absence) when other evidence points in the opposite direction.

For example, in discussing the purpose of Washington State's Blaine Amendment, the Brief discounts as meaningless the fact that Senator Blair argued for the federal Enabling Act's requirement that state constitutions guarantee "public schools . . . free from sectarian control," in part because the requirement would accomplish the purposes of the failed federal Blaine Amendment. *See* 20 CONG. REC. 2100-01 (Feb. 20, 1889) (statement of Sen. Blair) (praising failed Blaine Amendment and discussing the importance of preserving "nonsectarian" Protestantism in the common schools, while excluding "sectarian" doctrine). In isolation, this statement might well be meaningless. In context, however, it is telling, because it resonates with so much *other evidence* linking the Enabling Act and the consequent Washington Blaine Amendment to the original federal amendment and its purposes.

At the same time, the Brief emphasizes that that there were no recorded comments of individuals expressing particular hostility toward Catholics in the state-level debates over the Washington Blaine Amendment. Americans United Br. 29-30. If, as the Brief correctly notes elsewhere, *id.* at 28 n.76, such comments are of little value standing alone, their absence should be equally insignificant.[14] Their absence bears even less meaning in this case, because no remarks from the Constitutional Convention of 1889 were officially recorded, as the Brief also recognizes elsewhere. *Id.* at 28. In any event, the presence or absence of comments by legislators makes little difference in the face of substantial *other evidence,* discussed above, indicating that Washington's Blaine Amendment, like so many

[14] The Brief similarly emphasizes the absence of hostile remarks by framers of the Wisconsin and Oregon constitutions. *See* Americans United Br. at 16. That silence is meaningless as well.

others, was passed out of the same preference for "nonsectarian" Protestantism over "sectarian" Catholicism.

3. *Amici's* Competing Account Emphasizes Motives That Did Not Significantly Animate the Federal and State Blaine Amendments.

In order to diminish the predominant nativist purpose of the federal Blaine Amendment, its forerunners, and its progeny, the Brief attempts to attribute additional legislative purposes to these laws. These attempts fail.

The first additional motive is what the Brief describes generally as the "no-funding principle," which it associates with Thomas Jefferson and James Madison. Americans United Br. at 5-8. But what primarily concerned Jefferson, Madison, and others at the time was the practice of forced tithes, of "religious taxes," *id.* at 7, collected especially to support churches and their ministries. *See* HAMBURGER, at 9-10 (dissenters who shaped First Amendment sought to eliminate "state laws that, most notably, gave government salaries to ministers on account of their religion."). Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 916 (1986) ("The substantial political resistance to establishment focused on tax support for churches."). This is *not* the principle reflected in the federal and state Blaine Amendments: they targeted only "sectarian" religious schools for exclusion from government funding, precisely so that "nonsectarian" religious schools could still receive those funds. Notably, the Brief does not argue – nor could it – that either Jefferson or Madison advocated the special exclusion of religious schools – least of all schools of particularly disfavored denominations – from government funds allocated for general education.[15]

[15] Indeed, recent scholarship has explained how the framers' concern to avoid such religious assessments, and other legitimate separationist concerns, were later perverted and invoked to serve various nativist purposes, especially opposition to Catholic education. *See, e.g.*, HAMBURGER, at 480 ("Separation became a substantial part of American conceptions of religious liberty only in the nineteenth and twentieth centuries, when Americans felt growing fears of churches, especially the Catholic church."), VITERITTI, at 153 ("[Blaine's] name would live in

The Brief emphasizes that, in 1825, the first "sectarian" school to be excluded from public educational funding in New York City was Baptist, not Catholic. Americans United Br. 9-12; *see* RAVITCH, at 20-21. That does not alter the fact that, at the time of this denial, the Free School Society continued funding its "nonsectarian" schools, which touted a curriculum including "the fundamental principles of the Christian religion, free from all sectarian bias." Americans United Br. 9. At a minimum, then, denying the Baptist school cannot fairly be said to serve the benign "no funding" principle that the Brief would ascribe to the Blaine Amendments. Nor does an initial denial to Baptists change the fact that, once Catholic immigrants started flooding into the City a few years later, the "sectarian" schools became overwhelmingly Catholic, and the term came to be identified with them. *See supra* at 9-10 (noting that "sectarian" and "nonsectarian" initially distinguished among Protestant denominations until wave of Catholic immigration).

The Brief also suggests that the Know-Nothings' rise to political dominance in Massachusetts in 1854 reflected no broader trend and had no spillover effects into other states or their laws. *See* Americans United Br. 14-18. *But see* VITERITTI, at 150 ("The ugly experience in Massachusetts signaled an erupting national mood."); Laycock, 27 WM. & MARY L. REV. at 918 ("The anti-Catholic, anti-immigrant Know Nothing Party would sweep elections in eight states."). Strangely, the Brief cites in support a series of unspecified constitutional amendments that were passed within about five years of that watershed event, and suggests no other reason why these states would change their fundamental law on this particular issue within that time-frame.[16] Americans United Br. 15. *See also* MCGREEVY at

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perpetuity as a symbol of the irony and hypocrisy that characterized much future debate over aid to religious schools: employing constitutional language, invoking patriotic images, appealing to claims of individual rights. All these ploys would serve to disguise the real business that was at hand: undermining the viability of schools run by religious minorities to prop up and perpetuate a publicly supported monopoly of government-run schools.").

[16] The Brief claims that Michigan's 1835 amendment "served as the model" for these other states, *id.* at 15, but does not attempt to explain why they decided to adopt similar provisions one or two decades later, just as Catholic immigration was increasing, and just as the Know-Nothings reached their peak in Massachusetts.

40 (noting that, by 1852, "legislators in almost every state with a significant Catholic population – including Massachusetts, Kentucky, Pennsylvania, Ohio, Michigan, New York – were embroiled in fights over whether to aid Catholic schools or eliminate the King James Bible and Protestant hymns from the common schools."); VITERITTI, at 151 (noting that, by mid-century, Catholics were lobbying for equal treatment in education in several states including, among others, Illinois, Michigan, Minnesota, Ohio and California).

But even if a few *earlier* amendments in some states were somehow isolated from the trend typified by the Know-Nothings in Massachusetts, *later* laws were more explicit in targeting "sectarian" education for disfavor. *See, e.g.,* MINN. CONST. art. XIII, § 2 (1857) ("Prohibition As To Aiding Sectarian School. In no case shall any public money or property be appropriated or used for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught."); WIS. CONST. art. X, § 3 (1848) (establishing public schools and prohibiting only "sectarian" instruction therein). *See also* JORGENSON, at 187-204 (describing anti-parochial school legislation of 1889 in Illinois and Wisconsin based on recently failed attempts in Massachusetts); *id.* at 205-15 (describing similar Oregon legislation of 1922 that was struck down in *Pierce v. Society of Sisters,* 268 U.S. 510 (1925)).

Regarding the federal Blaine Amendment itself, the Brief emphasizes that concerns about federalism were expressed in the legislative debates. Americans United Br. at 24-25. But federalism was not an additional motive for *passing* the Blaine Amendment, it was a reason to *reject* it. *See id.* at 26. And, of course, the Brief ignores the conclusion of other scholars, supported by numerous examples, that "[n]ativistic appeals and accusations marked the congressional debate over the Blaine Amendment," and that "[w]ithout expressly identifying any wrongful sectarian instruction, the ensuing debate repeatedly focused on the divisiveness of separate schools for Roman Catholics." Utter & Larson, 15 HASTINGS CONST. L.Q. at 465-66; *see* MCGREEVY, at 93 (documenting expressions of hostility to Catholicism in debates surrounding federal Blaine Amendment).

In sum, the Brief fails to provide sufficient reason for this

Court to depart from the historical conclusions of seven of its Justices. The Brief suffers from several grave omissions; it treats evidence of individual remarks inconsistently; and it is unpersuasive in suggesting additional motives for the Blaine Amendments.

II. RELIGION-BASED HOSTILITY AND FEAR ARE NOT LEGITIMATE BASES FOR GOVERNMENT ACTION.

Another group of *amici* acknowledges that anti-Catholic fears fueled the movement for the Blaine Amendments, but argues instead that at least some of those fears were "legitimate." Brief *Amici Curiae* of the American Jewish Congress, *et al.* at 25-30 (hereinafter "AJCongress Brief"). This argument, too, should be rejected.

A. Even if It Were Not So Badly Distorted, the Account by Certain *Amici* of Nineteenth Century Catholic Beliefs Has No Place in the Decision-Making of This Court.

The AJCongress Brief argues that, although "raw anti-Catholicism" played a significant role in the Blaine Amendments, it was not a "but for" cause of those laws, because other, more respectable forms of anti-Catholicism were motivating factors as well. *Id.* at 26. On this account, the Blaine Amendments "were undertaken in response to positions of the Catholic Church as authoritatively enunciated by consecutive Popes in well publicized encyclicals," prompting "a legitimate fear" of Catholic domination. *Id.* at 26-27.

Thus, these *amici* ask the Court to deem "legitimate" the opposition to certain (alleged) Catholic doctrines. But this Court may not legitimize opposition to those doctrines any more than it may condemn the doctrines itself. *See Employment Division v. Smith*, 494 U.S. 872, 887 (1990) (noting "the unacceptable 'business of evaluating the relative merits of differing religious claims.'"); *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) ("The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such."); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, ..."); *Watson v. Jones*, 80 U.S. 679, 728

(1871) ("The law knows no heresy, ..."). This is dangerous constitutional territory that this Court should avoid entirely.

One way to avoid this issue is to reject its dubious factual premises. The argument depends on the claim that most anti-Catholic support for Blaine Amendments came not from the "raw" or "crude" bigots, *id.* at 29, 30, but from non-Catholic Americans who assiduously followed the latest in Vatican pronouncements.[17] *See id.* at 27-28. Notably, *amici* offer no evidence on the relative proportions of each type of anti-Catholic supporter of Blaine Amendments. Although anti-Catholicism in the United States hardly originated in the latter half of the 19th Century,[18] its intensification at that time is much more plausibly explained by waves of Catholic immigration than by whatever few Protestants may have read more encyclicals than most Catholics.

But even if the Court were willing to address the question, it should reject the claim that anti-Catholic fears and hostility

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[17] It is difficult to imagine a doctrinal future for any legal distinction between "raw" or "crude" hostility to religious belief, and whatever "legitimate" form the AJCongress Brief envisions. In any event, such a subjective and unworkable distinction has no doctrinal past. This Court has refused to distinguish "good" government hostility to religion and "bad" government hostility to religion, but instead has condemned them all. *See Lukumi*, 508 U.S. at 532 ("[T]he First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general."). Similarly, this Court has stated – without further differentiation – that "mere negative attitudes, or fear," are not legitimate bases for government action. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985).

[18] RAY ALLEN BILLINGTON, THE PROTESTANT CRUSADE 1800-1860: A STUDY OF THE ORIGINS OF AMERICAN NATIVISM 1 (1938) ("Hatred of Catholics and foreigners had been steadily growing in the United States for more than two centuries before it took political form with the Native American outburst of the 1840s and the Know-Nothingism of the 1850s. These upheavals could never have occurred had not the American people been so steeped in antipapal prejudice that they were unable to resist the nativistic forces of their day."); MARTY, at 45-47 (discussing role of Historian John Foxe's *Book of Martyrs* in "fir[ing] the anti-Catholic spirit that the English needed to spur them to mission and conquest" in the new world in the 16th Century).

prompting the Blaine Amendments were "legitimate." American Protestants did *indeed* take Vatican pronouncements, like the Syllabus of Errors, *See* Encyclical Letter of His Holiness Pope Pius IX, *Quanta Cura* (1864), out of context, for they were *indeed* directed at the radical anti-clericalism that characterized the recent European revolutions – not at the United States. *See* MCGREEVY, at 21, 37, 96-98. *See also* JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 67 (1960) (distinguishing American constitutionalism "sharply . . . from the system against which the Church waged its long-drawn-out fight in the nineteenth century, namely, Jacobinism, ..."). American Catholics promulgated and insisted on this interpretation of the documents of their own Church, as *amici* seem to acknowledge, but that interpretation was widely rejected by a relentlessly suspicious audience.[19] Moreover, none of these Vatican documents altered the consistent pattern of behavior of American Catholics to seek *only equal treatment*, in educational funding and elsewhere. *See, e.g.,* Orestes Brownson, *The Know-Nothings,* BROWNSON'S QUARTERLY REVIEW 117 (Jan. 1855) ("[The Church's] wish is to pursue her spiritual mission in peace, and keep aloof from politics, so long as they leave her the opportunity."). Nonetheless, *amici* would have this Court deem "legitimate" the sweeping conclusion of Blaine Amendment supporters that "the Catholic Church sought exclusive political power, and that, if it could, it would establish itself as the sole official church." AJ Congress Br. at 27. If addressed at all, this

[19] *Amici* note with particular dismay that the AJCongress Brief itself *still* refuses to accept as authoritative 19th Century American Catholics' interpretation of their own Church's documents, describing it instead as an "effort[] to explain away the Syllabus and the encyclicals." AJCongress Br. at 28. Similarly, the Brief suggests that American Catholics' interpretation reflected that they did not take the teachings of the Pope seriously. *Id.* at 29 ("Defenders of the existing order were legitimately entitled to forestall the possibility that, contrary to the protestations of American Catholics, the Church's authoritative spiritual leader was to be taken seriously; . . . ."). As it turns out, 19th Century American Catholics did a better job interpreting Vatican documents than their contemporary detractors. *See* VAT. II, *Dignitatis Humanae* (Declaration on Religious Freedom) § 3 (1965) ("In all his activity a man is bound to follow his conscience in order that he may come to God, the end and purpose of life. It follows that he is not to be forced to act in a manner contrary to his conscience.").

claim should be rejected.

B. The Fact That a Group Adheres to a Set of Unpopular Religious Beliefs May Not Serve as the Basis for Excluding That Group from Government Benefits.

Even if this Court were competent to engage in the evaluation of doctrine invited by the AJCongress Brief – and even if that Brief's account of Catholic doctrine of the late 19th Century were factually and theologically accurate – allegedly legitimate fears of Catholic *doctrine* still cannot justify the exclusion of Catholic *people and groups* from government benefits. *See Romer* v. *Evans,* 517 U.S. 620, 634 (1996) ("'a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.'") (quoting *Dept. of Agriculture* v. *Moreno,* 413 U.S. 528, 534 (1973)).

In other words, the Blaine Amendments were not a *mere declaration* that a particular Catholic doctrine was incorrect, un-American, or otherwise disfavored by a majority. (To be sure, that would be constitutionally problematic for different reasons, but that is not the issue here.) Instead, the Blaine Amendments were designed to (and still do) *impose special legal disadvantages* on Catholics because their beliefs were feared or hated by a sufficient majority. *Lukumi,* 508 U.S. at 533 (quoting *Smith,* 494 U.S. at 877). The government may not exclude Catholics from educational funding because a majority harbors fear or hostility toward their beliefs, any more than it may exclude Jews or Muslims from food stamp programs or garbage pick-up because a majority harbors fear or hostility toward their beliefs. *See Palmore v. Sidoti,* 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be affirmed.

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No. 02-1315

In the Supreme Court of the United States

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, ET AL.,
Petitioners,

v.

JOSHUA DAVEY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATES OF TEXAS, MISSISSIPPI, AND UTAH AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a state law that denies a state-funded scholarship to a student who is qualified for it by virtue of high school grades, family income, and attendance at an accredited college in the State—solely because the student decides to pursue a degree in theology—violates the student's constitutional rights.

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BRIEF OF THE STATES OF TEXAS, MISSISSIPPI, AND UTAH AS AMICI CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICI

The States of Texas, Mississippi, and Utah appear as *amicus curiae* in support of Respondent, Joshua Davey. *See* SUP. CT. R. 37.4.

Amici States have a significant interest in this case because of the important religious liberties at stake, most prominently the right of their citizens under the Federal Constitution to be free from governmental discrimination based on religious belief or association. *Amici* States have a strong interest in ensuring that each State's citizens are protected from invidious discrimination based on religious beliefs and in promoting a pluralistic society where each citizen may worship as he or she chooses without being subject to improper governmental discrimination.

SUMMARY OF THE ARGUMENT

Washington's Promise Scholarship program discriminates on the basis of religion. It provides a generally applicable benefit to all students who meet academic and financial need requirements, and then specifically excludes only those who choose to major in theology from a religious perspective. That discrimination is wrong, and it is unconstitutional.

The court of appeals below and the many briefs in this Court devote considerable time to attempting to categorize this case, to arguing whether it is a free exercise case, or a speech case, or a government funding case. Ultimately, in this case, that determination does not matter.

Regardless of into which "box" this case is placed, the Washington program violates the constitutional neutrality principle. And that principle flows, not from just one line of cases or another or one particular clause or another, but from the Free Exercise Clause *and* the Establishment Clause *and* the Free Speech Clause *and* the Equal Protection Clause. All four clauses converge to yield a single principle, and that principle controls this case: in administering a generally applicable program, government must maintain neutrality toward religion. It cannot discriminate in favor of religion, or in favor of one religion over another, and—critically—it cannot discriminate against religion.

Because the program is generally applicable, Washington's exclusion is not government speech; it is discrimination. And, the presence of a Blaine Amendment in the Washington State Constitution cannot justify that disparate treatment. Given the history of invidious religious bigotry that gave birth to state Blaine Amendments, this Court should read those amendments narrowly to promote, not hinder, the principle of neutrality. Such a reading will foster religious diversity and pluralism, and will prevent religious discrimination.

ARGUMENT

I. The Principle of Government Neutrality Toward Religion Emanates From Multiple Constitutional Sources.

Washington's Promise Scholarship law takes away from Joshua Davey a generally available benefit—an academic scholarship for which he is otherwise qualified—solely on the basis of Davey's decision to major in theology taught from a religious perspective. The panel majority in the court of appeals concluded that the principle of governmental neutrality toward religion reflected in this Court's jurisprudence compels the conclusion that the scholarship law violates Davey's First Amendment rights under the Free Exercise Clause. *Davey v. Locke*, 299 F.3d 748, 755-56 (CA9 2002). The dissenting judge, by contrast, viewed the scholarship law as simply a choice on Washington's part not to fund Davey's pursuit of religious education. *Id.*, at 761 (McKeown, J., dissenting) ("I see the question as being whether the State of Washington may constitutionally decline to fund pastoral studies as part of its Promise Scholarship. . . . This is a funding case, not a free exercise case or a free speech case.").

At base, the dispute in the court of appeals's opinions reflects a disagreement over the category into which this case fits best: free speech, free exercise, or governmental funding. The *amici* States would submit that, in this case, the category does not matter. Constitutional adjudication should not be an exercise in deterministic taxonomy; what matters is not the "box" into which a particular case fits, but rather the constitutional principle that controls the outcome.

Irrespective of how the case is pigeonholed, the principle of governmental neutrality toward religion requires affirmance of the court of appeals. The neutrality principle itself emanates from several constitutional sources: the Free Exercise Clause, the Establishment Clause, the Equal Protection Clause, and the Free

Speech Clause. U.S. CONST. amends. I, XIV. And the neutrality principle controls this case.

Neutrality has long been a fixed and constant star in the Court's jurisprudence addressing religious discrimination under the Establishment Clause, the Free Exercise Clause, the Equal Protection Clause, and the Free Speech Clause. These constitutional sources all converge in this case to demonstrate that Washington's scholarship program impermissibly discriminates on the basis of the recipient's religious choice. *Cf. Bd. of Ed. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 714-15 (1994) (O'Connor, J., concurring in part and in the judgment) ("We have time and again held that the government generally may not treat people differently based on the God or gods they worship, or do not worship. . . . In my view, the Religion Clauses—the Free Exercise Clause, the Establishment Clause, . . . and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits."). Accordingly, the Court should affirm the Ninth Circuit's decision holding Washington's scholarship law unconstitutional.

A. The Religion Clauses

This Court has most directly recognized the principle of governmental neutrality toward religion in the First Amendment's Free Exercise and Establishment clauses. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."). These clauses jointly ensure religious liberty by mandating that the government can neither "impose special disabilities on the basis of religious views or status," *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 877 (1990) (discussing requirement of neutrality in the Free Exercise Clause), nor foster "bias or hostility to religion," *Rosenberger v. Rector & Visitors of the Univ. of Va.*,

515 U.S. 819, 846 (1995) (discussing requirement of neutrality in the Establishment Clause). *See also Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) ("[The Free Exercise and Establishment clauses] are to be read together, and in light of the single end which they are designed to serve. . . . The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief.").

Through the interplay of the religion clauses, the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers" and "does not require the state to be their adversary." *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 18 (1947). As one First Amendment scholar has explained, although some perceive tension between the Free Exercise and Establishment Clauses, the two clauses are more appropriately viewed as "but two sides of the same coin" representing "a single value in our constitutional democracy—religious freedom." Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 313 (1986); *see also Larson v. Valente*, 456 U.S. 228, 245 (1982) ("Th[e] constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause. . . . Free exercise thus can be guaranteed only when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations."). Thus, a "proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of neutrality toward religion." *Comm. for Pub. Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973).

1. The Free Exercise Clause

"The Free Exercise Clause protects religious observers against unequal treatment." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993) (citation omitted). Laws burdening religious practices must be neutral and of general applicability; otherwise, they must be narrowly tailored to advance "interests of the highest order," a "most rigorous" form of strict scrutiny that is satisfied "only in rare cases." *Id.*, at 546. The minimum requirement of neutrality is that the law must not be facially discriminatory. *Id.*, at 533. And a law fails the test of general applicability if it is substantially underinclusive. *Id.*

In *Lukumi*, the Court unanimously struck down on Free Exercise grounds a group of municipal ordinances that sought to prevent the sacrifice of animals by practitioners of Santeria, a religion that had been banned in Cuba, its country of origin, and was viewed with suspicion in the United States. After examining those ordinances, the Court concluded that "religious practice [was] being singled out for discriminatory treatment." *Id.*, at 538.

The Court rejected the City of Hialeah's argument that the ordinances were validly aimed at preventing animal cruelty and avoiding health hazards from improper disposal because the City had not attempted to pursue these goals with regard to conduct not motivated by religious belief. *Id.*, at 544-45. For example, the City exempted small-scale commercial butchery but could not explain how this exemption was consistent with its expressed interest in preventing animal cruelty and maintaining public health. Because the ordinances distinguished between identical conduct based solely on religious belief—prohibiting animal slaughter by religious believers but allowing it by secular operations—the Court concluded that they constituted a "religious gerrymander" and struck them down as an impermissible burden on Santaria practitioners' free exercise rights. *Id.*, at 535-38.

Similarly, the Court invalidated on Free Exercise grounds a Tennessee law prohibiting ministers from serving as delegates to state constitutional conventions. *McDaniel v. Paty*, 435 U.S. 618, 629 (1978) (plurality op.); *id.*, at 630-31 (Brennan, J., concurring). In *McDaniel*, the law at issue did not focus on any particular religion but instead discriminated against religion generally by banning ministers or priests "of any denomination whatever" from serving as delegates to state constitutional conventions. *Id.*, at 620. The Court cited with approval James Madison's position on legislative attempts to exclude clergy from public office:

> Does not the exclusion of Ministers of the Gospel as such violate a fundamental principle of liberty by punishing a religious profession with the privation of a civil right? . . . Does it not in fine violate impartiality by shutting the door [against] the Ministers of one Religion and leaving it open for those of every other[?]

435 U.S., at 624 (quoting 5 Writings of James Madison 288 (G. Hunt ed. 1904)). Madison's position, the Court explained, "accurately reflects the spirit and purpose of the [Free Exercise and Establishment] Clauses." *Id.* Because Tennessee had conditioned the right to seek and hold office as a constitutional delegate upon the surrender of one's right to preach the religion of one's faith, the Court held that the law violated McDaniel's free-exercise rights. *Id.*, at 626.

The laws challenged in *Lukumi* and *McDaniel* violated the free-exercise neutrality principle because they singled out religious belief or affiliation as the basis for providing different treatment to persons who were otherwise similarly situated. In *Lukumi*, the City of Hialeah prohibited certain conduct—animal sacrifice—solely when done with religious intent, while allowing the same conduct when performed by persons unmotivated by religious belief. Similarly, the Promise Scholarship program takes away a generally

available benefit from Davey solely because of his declared intent—based on his religious faith—to study theology from a religious perspective. And like the law in *McDaniel*, which forced ministers to either abandon their religious calling or forgo their right to hold public office, the Promise Scholarship program discriminates against religion by forcing Davey to choose between majoring in religious theology and keeping the scholarship for which Washington had determined he was otherwise eligible. As the *Davey* majority correctly reasoned, *Lukumi* and *McDaniel* support the conclusion that Washington's scholarship program violates Davey's free exercise rights because it discriminates on the basis of religion. 299 F.3d, at 753-54.

Critical to the constitutional infirmity of the Washington program is the *general applicability* of the scholarship. The State of Washington has not decided it is going to subsidize one specific type of speech, *see infra* at 18-22, or promote one specific area of academic study. Rather, Washington has decided that every student who meets the academic and financial need requirements deserves a state scholarship—except those students who choose to major in theology from a religious perspective. Yet once the State has chosen to create a generally applicable benefit, it cannot discriminate against certain of its citizens solely because they choose to act on religious convictions or pursue religious study.

This principle is the obverse of the Court's holding in *Smith*, that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." 494 U.S., at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)

(Stevens, J., concurring in the judgment)).[1] Just as the Free Exercise Clause does not give license for religious believers to disregard neutral and generally applicable laws, neither does it permit government to exclude religious believers from otherwise generally applicable programs.[2]

Contrary to Petitioners' argument, the Promise Scholarship law does not pass muster under *Smith* as a generally neutral law that only incidentally burdens religion. Pet'r Br., at 33. Rather, as the

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[1] *Smith*'s neutrality principle was drawn, in turn, from the Court's earlier precedents rejecting Free Exercise challenges to generally applicable laws. *See, e.g., Lee*, 455 U.S., at 258-61 (rejecting Amish employer's claim of tax exemption on religious grounds); *Gillette v. United States*, 401 U.S. 437, 461-62 (1971) (rejecting claim that military draft violated free exercise rights of conscripted persons opposing war on religious grounds); *Braunfeld v. Brown*, 366 U.S. 599, 606-09 (1961) (plurality op.) (upholding validity of Sunday-closing laws against Free Exercise claim of burden on those whose religions compelled resting on days other than Sunday); *Prince v. Massachusetts*, 321 U.S. 158, 170-71 (1944) (rejecting parent's claim that Free Exercise Clause required exception to prosecution for violation of child-labor laws); *Reynolds v. United States*, 98 U.S. 145, 162-67 (1878) (rejecting claim that Free Exercise Clause prohibited application of polygamy laws to persons whose religion commanded polygamy).

[2] It is no answer to say that the Washington State program discriminates not against religious *belief*, but rather religious study. The same could be said of the law at issue in *McDaniel*, which focused on conduct rather than belief, allowing fervently believing non-clergy to run and prohibiting secretly non-believing clergy from doing the same. Government discrimination against the manifestations of religious belief (so long as they are not otherwise contrary to governing law) has the same invidious effect as discrimination against the underlying belief; government can no more discriminate indirectly against those who choose to go to church—or to study theology—than it can directly against those whose religious beliefs lead them to do the same.

court of appeals correctly observed, both the scholarship law and HECB's policy implementing it "refer on their face to religion," and the program is administered "so as to disqualify only students who pursue a degree in theology from receiving its benefit." *Davey*, 299 F.3d, at 753. A law that singles out students on the basis of their choice to engage in devotional-based religious study facially discriminates against religion and is not entitled to rational-basis deference under *Smith*.[3]

Nor can the law be justified on Petitioners' theory that it merely makes Davey's adherence to his faith more expensive, as Petitioners claim. Pet'r Br. at 33-36. If the Free Exercise Clause proscribed only direct restrictions on religious practice, then the outcome in *McDaniel* presumably would have been different. After all, the law struck down in *McDaniel* did not directly restrict or burden McDaniel's religious practice; instead, it discriminated against McDaniel by requiring him to abandon either his chosen religious calling or his elected office. Similarly, the Promise Scholarship law discriminates against Davey by forcing him either to abandon his chosen area of study—devotional theology—or to

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[3] Moreover, even if the scholarship law were deemed facially neutral, it would remain subject to strict scrutiny under *Smith* because Davey's constitutional claims involve "hybrid" constitutional rights. *See Smith*, 494 U.S., at 881-82 (describing situations involving "not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections."); *Soc'y of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1216 (CA5 1991) (applying hybrid-rights rule to hold that judge violated atheistic juror's free-speech and free-exercise rights by jailing her for contempt upon juror's refusal to give oath or affirmation), *aff'd en banc*, 959 F.2d 1283 (CA5 1992). Davey asserts—and the facts support—that Washington's scholarship program violates not only his free exercise rights but his rights under the Equal Protection Clause, the Establishment Clause, and the Free Speech Clause as well.

forgo the merit-based scholarship awarded him by Petitioners. Because the Free Exercise Clause prohibits discrimination against religious belief regardless of whether such discrimination constitutes a direct or indirect burden on religious practice, the scholarship law is constitutionally invalid.[4]

2. The Establishment Clause

Neutrality is also a bedrock principle in the Establishment Clause, which prevents states "from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion." *Zelman v. Simmons-Harris*, 536 U.S. 639, 648-49 (2002) (citing *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997)). "There is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'" *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987) (holding that exempting religious organization's secular nonprofit activities from Title VII's prohibition against religious

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[4] Nor can *McDaniel* validly be distinguished, as Petitioners assert, on the theory that Davey "is free to pursue his theology degree at another school using his own funds." Pet'r Br., at 39. Petitioners' theory rests on the unrealistic notion that Davey can "simultaneously us[e] his own money to pursue a theology degree in a separate program at a second school." *Id.*, at 25. Moreover, the alternative course of study suggested by Petitioners does not eliminate the discrimination worked by the Promise Scholarship program; that Davey alone is forced to choose between his chosen course of study and a scholarship to which he is otherwise entitled itself constitutes the very discrimination against religion that the Constitution forbids. Under Petitioners' theory, the law in *McDaniel* would have been saved from unconstitutionality by virtue of the fact that McDaniel—who as a minister was barred from serving as a state constitutional delegate—was presumably free to pursue other elected positions. The Court has never embraced such a theory.

discrimination in employment did not violate Establishment Clause) (quoting *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970)). Moreover, neutrality toward religion is a "significant factor" in upholding government programs against Establishment Clause challenges. *Rosenberger*, 515 U.S., at 839.

So long as a government program is neutral—between and among different religions, and between religion and nonreligion—the fact that, through the exercise of individual choice on the part of the recipient, government money ultimately goes to religious ends does not render the government program invalid.[5]

The Court's Establishment Clause jurisprudence reflects a requirement of neutrality toward religion that exists in harmony with the neutrality commanded by the Free Exercise Clause. And a long line of this Court's cases make clear that neutrality both satisfies and is required by the Establishment Clause. *See Zelman*, 536 U.S., at 653-54 (holding that state's school-voucher program did not violate Establishment Clause because it was "neutral in all respects toward religion," accomplished a secular purpose of providing educational assistance to a broad class of persons without regard to religion, and contained no financial incentives favoring

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[5] For example, suppose a western state were to have a problem with bobcats and decided to establish a bounty of fifty dollars per bobcat to induce citizens to reduce the population. If a preacher were to go out and shoot ten bobcats and then demand his $500—even if he were to admit that every penny was to be used to purchase and distribute Bibles—there would be no Establishment Clause problem with giving him the money. The program itself would be facially neutral, and the religious ends achieved would be not because of the favoritism of government but because of the individual choice of the recipient. The same, of course, is true with respect to Joshua Davey's choice about how to spend his scholarship money, and the State should not discriminate against his individual religious choice.

religious schools over non-religious ones); *Mitchell v. Helms*, 530 U.S. 793, 808-11 (2000) (plurality op.) (upholding State's loan of non-religious educational materials to religious schools because aid had valid secular purpose and was offered on religion-neutral basis to all schools); *Agostini*, 521 U.S., at 234-35 (holding that provision of remedial instruction by government employees at sectarian schools did not violate Establishment Clause when provided to disadvantaged children on neutral basis pursuant to program containing safeguards preventing state-sponsored religious indoctrination); *Kiryas Joel Village Sch. Dist.*, 512 U.S., at 704 (plurality op.) (discussing "general principle that civil power must be exercised in a manner neutral to religion"); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10-11 (1993) (rejecting claim that school district's provision of sign-language interpreter to deaf student attending sectarian school pursuant to federal law violated Establishment Clause, because aid was part of general program providing benefits neutrally to any disabled child without regard to sectarian or non-sectarian character of child's school); *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 14-15 (1989) (plurality op.) (striking down sales tax exemption available exclusively to religious publications); *Bowen v. Kendrick*, 487 U.S. 589, 608 (1988) (upholding statute enlisting a "wide spectrum of organizations," including religious organizations, in addressing adolescent sexuality because the law was "neutral with respect to the grantee's status as a sectarian or purely secular institution"); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (*Witters II*) (upholding State's provision of tuition payments for vocational training to blind person pursuing pastoral training at Christian college); *Mueller v. Allen*, 463 U.S. 388, 398 (1983) (upholding state law allowing tax deduction for educational expenses, despite fact that vast majority of deductions went to parents of children attending sectarian schools, because deduction was available to all parents on religion-neutral basis); *Walz*, 397 U.S., at 673 (sustaining tax exemption for religious properties when

State had "not singled out one particular church or religious group or even churches as such" but instead had exempted "a broad class of property owned by nonprofit, quasi-public corporations").[6]

B. The Equal Protection Clause

The neutrality required under the Free Exercise and Establishment Clauses is closely related to the neutrality principles undergirding the Equal Protection Clause. "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, *religious*, sexual, or national class." *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (emphasis added) (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting), and *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1083 (1983)).

This Court has long recognized that equal protection principles apply at the convergence of free-speech and free-exercise rights. *See Niemotko v. Maryland*, 340 U.S. 268, 272 (1951) ("The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body."); *id.*, at 284 (Frankfurter, J.,

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[6] The neutrality principle is not at odds with the recognition of a facilitation of religion that lies "between the accommodations compelled by the Free Exercise Clause and the benefits to religion prohibited by the Establishment Clause." Michael W. McConnell, Accommodation of Religion, 1985 SUP. CT. REV. 1, 3. *See, e.g. Sherbert v. Verner*, 374 U.S. 398 (1963) (holding denial of unemployment benefits to person whose religious beliefs forbade working on Saturdays violated Free Exercise Clause); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that compulsory education law violated Amish parents' free exercise rights).

concurring in the result) ("To allow expression of religious views by some and deny the same privilege to others merely because they or their views are unpopular, even deeply so, is a denial of equal protection of the law forbidden by the Fourteenth Amendment."). For example, in *Police Department of Chicago v. Mosley*, the Court struck down a statute exempting peaceful labor picketing from a general prohibition on picketing next to a school, concluding that the need for content neutrality in a state's "time, place, and manner" regulations of speech involved an equal protection claim closely intertwined with First Amendment interests: "[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny its use to those wishing to express less favored or more controversial views . . . . There is an 'equality of status in the field of ideas.'" 408 U.S. 92, 95-96 (1972); *see also Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 505 (1984) (noting that principle of viewpoint-neutrality "underlies the First Amendment itself").

The anti-discrimination principle enshrined in the Religion Clauses is consonant with the Court's recognition that classifications based on religion are subject to strict scrutiny because the Equal Protection Clause forbids discrimination on the basis of a person's religious belief. *See Smith*, 494 U.S., at 886 n.3.; *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 651 (1992); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam); *see also Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 292 (1998) (Stevens, J., concurring and dissenting) ("[N]o one would contend that a Governor could ignore the commands of the Equal Protection Clause and use race, religion, or political affiliation as a standard for granting or denying clemency."); *Griffin v. Illinois*, 351 U.S. 12, 17 (1956) (plurality op.) ("In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color."); *accord Ball v. Massanari*, 254 F.3d 817, 823 (CA9 2001); *Maldonado v. Houstoun*, 157 F.3d 179, 184 (CA3

1998); *Hayden v. Grayson*, 134 F.3d 449, 453 n.3 (CA1 1998). And in a related vein, the Court has long declared that the decision whether to prosecute a person who has broken the law may not be based on religion. *See McClesky v. Kemp*, 481 U.S. 279 (1987) (citing *Oyler v. Boles*, 368 U.S. 448 (1962)).

It is therefore unsurprising that the Court has looked repeatedly to its equal protection jurisprudence in assessing neutrality for purposes of both Free Exercise and Establishment Clause analysis. *See Lukumi*, 508 U.S., at 540 (applying equal protection principles to Free Exercise analysis) (citing *Walz*, 397 U.S., at 696 (opining that the Establishment Clause "*requires an equal protection mode of analysis.* The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.") (Harlan, J., concurring) (emphasis added)); *see also Lukumi*, 508 U.S., at 578 (Blackmun, J., concurring) (describing the *Smith* Court as "treat[ing] the Free Exercise Clause as no more than an antidiscrimination principle").[7]

Accordingly, the Equal Protection Clause serves as yet another source of the neutrality principle that forbids governmental discrimination against religious belief.

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[7] First Amendment scholars have applauded the equal-protection aspect of the Court's treatment of the Religion Clauses. *See, e.g.*, Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L., ETHICS & PUB. POL'Y 341, 365-72 (1999); Paulsen, *supra*, at 325 ("[T]he establishment clause is best understood as providing for the equal protection of the free exercise of religion."). That equal protection component can be recognized for its independent force or characterized as an aspect of incorporation, focusing like a lens the contours of the Religion Clauses. *See Recent Development: Animal Sacrifice and Equal Protection Free Exercise*, 17 HARV. J. L. & PUB. POL'Y 262 (1994); *cf.* Akhil Amar, *The Bill of Rights as a Constitution*, 100 YALE L. J. 1131, 1136-37 & n.23 (1991).

C. The Free Speech Clause

1. The Free Speech Clause Prohibits Governmental Discrimination Against Religious Viewpoints.

The neutrality principle expressed in the Religion Clauses is also echoed in the Free Speech Clause's prohibition on viewpoint discrimination. This Court has repeatedly held that the Free Speech Clause forbids the exclusion of speakers or groups from a public forum or limited public forum because of their religious message. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 120 (2001) (holding that public school's exclusion of Christian Bible club from after-school community-use program based on club's religious nature constituted impermissible viewpoint discrimination); *Rosenberger*, 515 U.S., at 842-46 (holding that state university's refusal to fund student group's newspaper expressing Christian editorial viewpoint was viewpoint discrimination, and that funding newspaper as part of general, religion-neutral program funding various student groups did not violate Establishment Clause); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390-96 (1993) (holding that exclusion of Christian-oriented film series from program allowing various groups to use school premises after school hours constituted viewpoint discrimination, and rejecting argument that allowing films would violate Establishment Clause); *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (holding that state university could not deny student prayer and Bible-study group access to university facilities available to other student groups).

Davey's Free Speech rights are implicated both by his declaration of intent to pursue the study of theology from a devotional perspective—which caused Washington to revoke his Promise Scholarship, *see* JA 97—and by his choice to pursue that academic course of study itself, *cf. Grutter v. Bollinger*, 123 S.Ct. 2325, 2336 (2003) ("[A]cademic freedom [has] 'long been viewed

as a special concern of the First Amendment.'") (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J., concurring)); *see also id.*, at 2338 (same).

2. The Scholarship Law's Exclusion of Devotional Theology Students Constitutes Viewpoint Discrimination Under *Rosenberger*.

Rosenberger is particularly instructive because it, like the present case, involved a refusal to provide funding—a generally available benefit for which the applicant otherwise qualified—solely on the basis of religious belief. In *Rosenberger*, the defendant university subsidized the printing costs for a variety of student publications as part of a general program supporting extracurricular student activities paid for by a student fee assessment. 515 U.S., at 822-24. When WAP, a Christian student group, sought reimbursement for publishing its religious-themed newspaper, the university denied funding on the ground that the newspaper involved "religious activity" for which university rules prohibited funding. WAP sued, claiming violations of its rights to freedom of speech and press, free exercise, and equal protection. *Id.*, at 827. The court of appeals affirmed summary judgment for the university, holding that the university's actions constituted viewpoint discrimination but that such discrimination was justified by a compelling interest in maintaining strict separation of church and State. *Id.*, at 828.

This Court reversed, holding that the university's funding choice unjustifiably violated WAP's free speech rights. Because the university "select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints," it engaged in viewpoint discrimination; nor was this cured by the university's refusal to fund all religious views, since that was simply discrimination "against an entire class of viewpoints." *Id.*, at 831. Noting that the university had created a forum "more in a

metaphysical than in a spatial or geographic sense," the Court stated that the university was entitled to reserve its self-created forum for certain groups or discussion topics but could not engage in viewpoint discrimination within those limits once it had created the limited public forum. *Id.*, at 829-30. And in so holding, the Court rejected the university's argument—similar to Washington's argument in this case based on its state constitution—that the asserted need to satisfy Establishment Clause requirements justified its discriminatory treatment. *Id.*, at 837-847.

The court of appeals relied heavily on *Rosenberger*. *See Davey*, 299 F.3d, at 756. And for good reason: *Rosenberger*, like the instant case, involved a generally applicable government program, administered in such a way as to discriminate specifically against those exercising their religious liberty. Neither program, administered in such a discriminatory manner, is constitutional.

3. The "Funding" Cases Are Inapposite.

Significantly, the Court in *Rosenberger* rejected the argument that the prohibition of viewpoint discrimination was inconsistent with the Court's funding decisions involving a governmental body's *own* speech. 515 U.S., at 832, 834 (discussing *Rust v. Sullivan*, 500 U.S. 173 (1991), and *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540 (1983)). *Rust* and *Regan* held that the government may use tax dollars to promote its own policies over competing policies without violating the First Amendment, even though the competing policies may involve constitutionally protected activities. *See Rust*, 500 U.S., at 194 (upholding federal prohibition on abortion-related advice applicable to recipients of federally-funded family-planning counseling); *Regan*, 461 U.S., at 548 (upholding federal law allowing veterans' groups with tax-favored status to engage in lobbying while denying tax-favored status to other lobbying groups). In contrast, by choosing to support a "broad range of extracurricular student activities" related

to its educational purpose, the University of Virginia was not "itself speak[ing] or subsidiz[ing] transmittal of a message it favors but instead expend[ing] funds to encourage a diversity of views from private speakers." 515 U.S., at 824, 834. *Rosenberger*'s holding that the university could "not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the [government's] own speech, which is controlled by different principles." *Id.*, at 834.

For much the same reason, Petitioners' reliance is misplaced on *Rust*, *Regan*, and other cases reiterating the principle that the government's refusal to sponsor the exercise of constitutional rights is not itself unconstitutional. *See* Pet'r Br. at 24 (discussing, *inter alia*, *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (holding that statute requiring artwork meriting federal funding to demonstrate decency and respect for diverse values and beliefs was not invalid restriction of free speech rights); *Harris v. McRae*, 448 U.S. 297 (1980) (rejecting claim of right to federal funding for medical services incident to constitutional right to medically necessary abortions), and *Maher v. Roe*, 432 U.S. 464 (1977) (rejecting claim of right to federal funding for medical services incident to constitutional right to non-therapeutic abortions)).

The State of Washington's position in this case is not at all similar to that of the federal government in the above cases, which was "speaking on its own behalf" by using taxpayer funds to advance particular policy choices. By offering Promise Scholarships to all high-achieving students of lower- to middle-income families, Washington is not attempting to subsidize any message or to further any specific policy interest over a competing policy; it is simply rewarding academic achievement and encouraging meritorious high school students of modest means to pursue their college education in Washington State. Because Washington is providing a generally available benefit—like the student-activity funding provided in *Rosenberger*—in so doing it

may not engage in viewpoint discrimination by disqualifying eligible recipients based on religious belief.

Moreover, the cases on which Petitioners rely expressly condemn the type of discrimination fostered by the Promise Scholarship program. *See Finley*, 524 U.S., at 587 ("If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case."); *Leathers v. Medlock*, 499 U.S. 439, 447 (1991) ("[D]ifferential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints.").

4. Although Petitioners Are Not Required to Provide Promise Scholarships, They Could Not Offer Them to All Qualified Students Except Those Studying Devotional Theology.

Petitioners' argument that Davey has no constitutional right to have his education subsidized by the State, Pet'r Br. at 36-39—while correct as a general proposition—does not relieve Petitioners of their constitutional obligation to maintain religious neutrality. Although Washington was not required to fund Davey's study of religion *ab initio*, once the State created a generally available benefit—a scholarship offered to all qualified students—it could not withdraw Davey's scholarship based solely on his choice to focus on the study of theology from a religious perspective, just as the University of Virginia could not refuse WAP's student activity-fee funding based on its choice to publish a newspaper expressing a religious perspective. The court below correctly followed *Rosenberger* in holding that *Rust*, *Regan*, and similar "funding" cases are inapplicable to the present case because those cases involved the government's own speech—its use of funding to advance specific policy determinations—rather than the provision of a generally available benefit. *Davey*, 299 F.3d, at 756.

There is no doubt that, had Washington State chosen to engage in particular speech or subsidize particular conduct, it could have done so without running afoul of constitutional limitations. For example, if the Washington Legislature believed that there were too few engineers in Washington, it could easily have established a scholarship program to fund more engineers.[8] But there is no credible argument that that is what Washington State was attempting to do here. The Promise Scholarship does not focus funding on a few specific areas that the State seeks to promote; instead, it promotes higher education for all high achieving Washington students of limited means—and then specifically excludes those who choose to study theology from a religious perspective.

Once a generally applicable program is provided, it cannot be administered in such a discriminatory manner. For example, in the employment context, although an employer can discharge an "at-will" employee for any reason or no reason at all, an employer cannot terminate an employee on account of his or her race in contravention of federal law. *See, e.g., Perry v. Woodward*, 199 F.3d 1126, 1133 (CA10 1999), *cert. denied*, 529 U.S. 1110 (2000). Similarly, the broad latitude governments enjoy with respect to funding choices does not allow them to discriminate on the basis of religion. *See Finley*, 524 U.S., at 588 ("So long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities."). While States are not constitutionally required to fund the advocacy of viewpoints espoused by any individual or group, they may not deny or take away a generally available benefit solely because the recipient

[8] Of course, even that limited program could be administered in an unconstitutional manner. For example, although the program could legitimately prohibit recipients from double majoring in other subjects, it could not allow double majoring in any subject *except* theology.

espouses a religious viewpoint. "The bottom line is that the government may limit the scope of a program that it will fund, but once it opens a neutral 'forum' (fiscal or physical), with secular criteria, the benefits may not be denied on account of religion." *Davey*, 299 F.3d, at 756.

The Free Speech Clause does not allow a State distributing a generally available benefit to engage in viewpoint discrimination based on the recipient's religious views or self-identification. *See Widmar*, 454 U.S., at 267-68 ("The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place."). Washington's Promise Scholarship program violates that neutrality principle because it discriminates among scholarship recipients on the basis of their choice to study religion from a devotional perspective.

II. Washington's Scholarship Program Undermines the Constitutional Goal of a Pluralistic Society.

Underlying the principle of religious neutrality emanating from multiple constitutional sources is an ideal of a pluralistic society that not only tolerates but encourages the participation of a diverse variety of viewpoints and opinions. For example, this Court has observed that the Establishment Clause's guarantee of neutrality is respected "when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger*, 515 U.S., at 839; *see also County of Allegheny v. ACLU*, 492 U.S. 573, 634 (1989) (O'Connor, J., concurring) ("[T]he relevant question for Establishment Clause purposes is whether [a] . . . display . . . sends a message of government endorsement of [religion] or whether it sends a message of pluralism and freedom to choose one's own beliefs."); *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) ("In our modern,

complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court."); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) ("We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma."); *cf. Kiryas Joel Village Sch. Dist.*, 512 U.S., at 711 (concluding that State's creation of special school district for religious sect violated Establishment Clause and noting that law "affirmatively supports a religious sect's interest in segregating itself and preventing its children from associating with their neighbors").

The courts of appeals have similarly recognized that the neutrality principle of the Establishment Clause serves to promote cultural diversity and religious freedom. *See Gilfillan v. City of Philadelphia*, 637 F.2d 924, 930 (CA3 1980) ("An auspicious aspect of our pluralistic society is its rich religious diversity. The essential purpose of the Establishment Clause reflects this pluralism."); *O'Hair v. Andrus*, 613 F.2d 931, 934-35 (CA D.C. 1979) ("A central aspect of our pluralist society is its religious diversity. This pluralism reflects the very purpose of the Establishment Clause. And this pluralism is nurtured by the precept of equal access to a public facility generally open to the public.").

III. Washington's Scholarship-Funding Restrictions Promote Religious Discrimination, Not Religious Neutrality.

Religious liberty occupies privileged ground in our constitutional hierarchy. Our nation was founded by those fleeing religious persecution and seeking freedom of conscience and belief. Indeed, the very first words in the First Amendment protect religious liberty. Accordingly, governmental efforts to treat religious beliefs and conduct not with neutrality, but *worse* than

secular beliefs and conduct, should be met with the highest skepticism.

Petitioners rely on the Establishment Clause in Washington's State Constitution to excuse the discriminatory treatment sanctioned by the Promise Scholarship law. *See* Pet'r Br. at 4-5. Of course, a state constitution cannot authorize what the federal Constitution forbids, and the religious discrimination here cannot survive federal constitutional scrutiny.

Of equal importance, the particular state constitutional provision advanced by Petitioners is one borne of a "hostility to aid to pervasively sectarian schools [that] has a shameful pedigree that [the Court does] not hesitate to disavow." *Mitchell*, 530 U.S, at 828 (plurality op.). *See generally* Brief of the State of Alabama, as Amicus Curiae in Support of Respondent.

In the latter half of the nineteenth century, anti-Catholic sentiment gained in influence nationally. In an 1875 speech, President Grant described the Catholic Church as a source of "superstition, ambition and ignorance" and called for measures to "[e]ncourage free schools and resolve that not one dollar of money appropriated to their support, no matter how raised, shall be appropriated to the support of any sectarian school." President Ulysses S. Grant, Address to the Army of Tennessee at Des Moines, Iowa (Sept. 29, 1875) (unpublished manuscript and typescript available in the Library of Congress) (quoted in Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 51 (1997) (hereinafter "Laycock")). Grant's speech similarly praised "good common school education" that, he said, should be "unmixed with sectarian, pagan or atheistical dogmas." *Id.* (quoted in Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 558 (2003) (hereinafter "DeForrest")).

The "good common school education" acclaimed by Grant was not a religiously neutral education. Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 45 (1992) ("In all levels of education, both public and private, primary through collegiate, the moral teachings of the Bible were taught, and, to varying degrees, religious services were conducted.").

Indeed, Grant's fear that "sectarian"[9] doctrines would overtake the common school appeared to stem from the combination of an increasingly Catholic population and a decreasing tolerance for Protestant instruction in the public schools. DeForrest, *supra*, at 558. Between 1776 and 1866 the population of Catholics in America rose from one percent to ten percent of the total population—a ten-fold relative increase. *Id.*, at 561. By the mid- to late-1800s, "there was a move to de-Protestantize the common schools by removing the King James Bible from the curriculum and ending Protestant devotional activity in the classrooms." *Id.*, at 560. In Maine, a Catholic public-school student was expelled for refusing to read from the King James Bible; the Maine Supreme Court upheld the suspension, holding that the King James version of the Bible could not be considered "sectarian." *Id.*, at 561-62 (citing *Donahoe v. Richards*, 38 Me. 379, 379 (1854)). In some areas, Catholic groups sought and obtained state aid for parochial education. *Id.* At that time, "[a]nti-Catholic sermons were commonplace in Protestant churches, and anti-Catholic organizations began to sprout up, dedicated to continuing the Protestant character of common schools and united in their opposition to government aid for parochial education." *Id.*, at 563.

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[9] As this Court has noted, the latter half of the nineteenth century was "a time of pervasive hostility to the Catholic Church and to Catholics in general" and "it was an open secret that 'sectarian' was code for 'Catholic.'" *Mitchell*, 530 U.S., at 828 (plurality op.).

Against this backdrop of religious disagreements in the public schools, Congressional Representative James Blaine answered Grant's call to keep "good common school education" "unmixed with sectarian, pagan or atheistical dogmas." *Id.*, at 558. Blaine proposed an amendment to the U.S. Constitution prohibiting state money from being used for religious instruction:

> No public property, and no public revenue of, nor any loan of credit by or under the authority of, the United States, or any State, Territory, or District, or municipal corporation, shall be appropriated to, or made or used for, the support of any school, educational or other institution, under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular creed or tenets of any religious or anti-religious sect, organization, or denomination shall be taught.

H. Res. 1, 44th Cong. (1876). This amendment passed the House of Representatives but narrowly failed in the Senate. Had the Blaine Amendment passed and been adopted, it would not have ended the practice of religion in public schools; instead, it would have "permit[ed] Bible reading in the public schools but forbidd[en] any use of state or federal funds to support religious school." Laycock, *supra*, at 51.

While the Blaine Amendment failed to gain enough votes to gain entry to the U.S. Constitution, it did add its influence to many state constitutions. In fact, the Blaine Amendment gained enough support nationally that Congress passed legislation requiring new States entering the union to adopt similar language in their state constitutions. *McCollum v. Bd. of Educ.*, 333 U.S. 203, 220 (1948) (Frankfurter, J., concurring) ("[E]very State admitted to the Union since 1876 was compelled by Congress to write into its constitution a requirement that it maintain a school system 'free from sectarian control.'"); *see, e.g.*, Act of Feb. 22, 1889, ch. 180, 25 Stat. 676

(1889) (enabling the admittance of North Dakota, Montana, South Dakota, and Washington into the United States, and requiring the states to maintain "public schools . . . free from sectarian control").

Washington was thus required to add such language to its constitution as a condition of statehood, and did indeed add Blaine-like language in WASH. CONST. art. I, §11 ("No public money or property shall be appropriated for, or applied to any religious worship, exercise, or instruction, or the support of any religious establishment") and WASH. CONST. art. IX, §4 ("All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence."). *See also* Robert F. Utter & Edward J. Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 HASTINGS CONST. L.Q. 451, 478 (1988) (hereinafter "Utter & Larson").

There is little evidence of the Washington Framers' intentions regarding these provisions; nevertheless, the scant evidence available suggests that, at a minimum, the Washington Framers were no more endeavoring to promote religious neutrality than Representative James Blaine had been. The Washington Framers considered a proposal to include in article IX, §4 a provision prohibiting religious exercises or instruction, but they rejected that proposal. THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889, at 329, 689 (B. Rosenow ed. 1962); *see also* Utter & Larson, *supra* at 478. Similarly, Washington Senator William W. Blair made clear his view that article IX, § 4 would not prohibit public schools from educating pupils in "virtue, morality, and the principles of the Christian religion." Utter & Larson, *supra*, at 461-67.

The history of article I, §11 and article IX, §4 shows that these provisions are tarnished with bigotry and religious discrimination. Unfortunately, Washington is not alone in sharing in this ugly

chapter of American history. The religious bigotry that characterized the introduction of the Blaine Amendment bore fruit in the many States that are today burdened with their own Blaine Amendments.[10]

Given this history, the Court should continue to "disavow" the "shameful pedigree" of Blaine Amendments, *Mitchell*, 530 U.S, at 828 (plurality op.). The Court need not rule that Blaine Amendments in general—or article I, §11 and article IX, §4 of the Washington Constitution in particular—are themselves unconstitutional; rather, the Court should hold simply that they must be read in accordance with the dictates of the federal Constitution. And the Court should make clear that these remnants of another time cannot justify a State's departure from the Court's bedrock principle of neutrality with respect to religion.

As this Court has stated, the "guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are

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[10] Indeed, *amicus* the State of Texas has its own Blaine Amendment, TEX. CONST. art. I, §7, which the Texas Supreme Court has simply left on the books and wisely not given independent life beyond the federal Religion Clauses. In the shadow of these many Blaine Amendments, *amici* the State of Vermont *et al.* can readily point to other state programs with exclusions similar to Washington's. *See* Br. of *Amici* the State of Vermont *et al.* in Support of Petitioner, at 18 n.5. Yet the presence of such additional programs—perhaps even within the signatories to the instant *amicus* brief—underscores, rather than undermines, the importance of the Court's clarifying that Blaine Amendments and programs promulgated in their spirit cannot contravene the principle of neutrality and cannot discriminate on the basis of religion. Such a holding will protect the religious liberty and constitutional rights of the citizens of all *amici* States.

broad and diverse." *Rosenberger*, 515 U.S., at 839. Requiring Washington's Promise Scholarship to no longer exclude devotional theology students will promote that diversity, respect the constitutional norm of neutrality, and prevent unconstitutional discrimination on the basis of religion.

CONCLUSION

For these reasons, the judgment of the Ninth Circuit should be affirmed.

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In The Supreme Court of the United States

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Petitioners,

v.

JOSHUA DAVEY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE INSTITUTE FOR JUSTICE, THE CENTER FOR EDUCATION REFORM, CATO INSTITUTE, CITIZENS FOR EDUCATIONAL FREEDOM, AND THE GOLDWATER INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*[1]

The **Institute for Justice** is a 501(C)(3) nonprofit, public interest law firm dedicated to protecting individual liberties. One of the core areas on which the Institute focuses its activities is the promotion of parental choice in education. Since its founding 12 years ago, the Institute has participated in the defense of every parental choice program passed by the various state legislatures, including *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), usually by representing as defendant-intervenors parents of schoolchildren attending schools using scholarships made available under these programs. A primary legal issue in these cases has been whether the inclusion of parental options to choose a religious school for their children to attend comports with the federal and state constitutions' religion clauses.

The **Center for Education Reform** ("CER") is a national voice for more choices in education and more rigor in education programs, both of which are key to more effective schooling. CER delivers practical, research-based information and assistance to engage a diverse lay audience – including parents, policymakers and education reform groups – in taking actions to ensure that U.S. schools are delivering a high quality education for all children in grades K-12.

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[1] This brief is filed with the consent of the parties. No counsel to any of the parties to this matter authored this Brief in whole or in part. No person or entity other than the *amici curiae* made a monetary contribution to the preparation and submission of this brief.

The **Cato Institute** was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government and to secure those rights, both enumerated and unenumerated, that are the foundation of individual liberty. Towards those ends the Institute and the Center undertake a wide variety of publications and programs. The instant case raises squarely issues of increased choice in the educational marketplace and the interaction of the First Amendment Establishment Clause and Free Exercise values and thus is of central interest to Cato and the Center.

Citizens for Educational Freedom ("CEF") is a national, grassroots organization with its headquarters in Missouri. Founded in 1959, CEF is dedicated to supporting parents' rights to choose schools for their own children. The **Educational Freedom Foundation** is a charitable foundation affiliated with CEF and serves to educate the public about parental rights in education and school choice issues.

The Goldwater Institute, established in 1988, is a nonprofit, independent, nonpartisan, research and educational organization dedicated to the study of public policy. Through its research papers, editorials, policy briefings and forums, the Institute advocates public policies founded upon the principles of limited government, economic freedom and individual responsibility. One of the central missions of the Goldwater Institute is studying and

promoting parental decision making and control in education.

SUMMARY OF ARGUMENT

The U.S. Constitution does not permit states to control or channel the free and independent choices of individuals in matters of religion or speech. Yet, in the case under consideration, that is precisely what the state of Washington has sought to do under the aegis of the state constitution's Blaine Amendment (Wash.Const. art. 1, section 11). More broadly, the state has asserted the right to subsidize individuals' choices of secular higher education while denying equal benefits to those who would choose an education with religious purpose. This constitutes discrimination on the basis of religion, violating no less than four provisions of the Federal Constitution.

As the Ninth Circuit held below, Washington's denial of a Promise Scholarship to Joshua Davey solely because he had chosen to pursue a Pastoral Studies major at a religious college violated his rights under the Free Exercise of Religion Clause of the First Amendment. His choice of this major was religiously motivated, and Washington's denial was unquestionably based upon its conclusion that to fund his scholarship would violate the state's Blaine Amendment language prohibiting the application of state funds to religious instruction or the support of any religious establishment.

Washington's action also constituted viewpoint discrimination under the Free Speech Clause. Were Davey studying theology courses at a public or private secular university he would have received the scholarship. It was

only because his college was religious and taught theology from the perspective of religious truth that Washington disqualified him from state aid.

In distinguishing between theology programs and courses at religious versus secular institutions, Washington plainly draws a line on the basis of religion, a suspect classification under the Equal Protection Clause of the Fourteenth Amendment and subject to strict scrutiny under this Court's precedents. Washington lacks a compelling justification for this religious discrimination, nor is its exclusion of Mr. Davey narrowly tailored to meet such a justification.

Finally, by discriminating against individuals choosing to major in religious studies offered from a religious perspective at religious colleges, Washington violates the Establishment of Religion Clause by deliberately hindering religion as against non-religion. The religious neutrality called for by this Court's *Lemon* test for Establishment Clause violations forbids programs with a primary effect either advancing *or inhibiting* a particular religion or religion in general. Extending the reach of Washington's Blaine Amendment to encompass the free and independent choices of private individuals plainly has the primary effect of inhibiting religion.

ARGUMENT

I. INTRODUCTION

Washington, like 36 other states, has a religion clause in its state constitution familiarly known as a Blaine Amendment.[2] Some 29 states, not including Washington, have what commentators characterize as "compelled support" clauses involving religion in their constitutions.[3] All told, only three states have neither sort of provision in their constitutions.[4] Virtually all of these religion clauses were adopted long before – in some cases, more than a century before – this Court held in 1947 that the federal Constitution's religion clauses apply to the states in *Everson v. Board of Education*, 330 U.S. 1 (1947). The existence and prevalence of these state religion clauses create a myriad of opportunities for conflicting interpretations of state and federal requirements. One area where

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[2] The common denominator of what we term the Blaine Amendments is a prohibition on state aid to sectarian (*i.e.*, religious) institutions. A number of states adopted such provisions before the federal Blaine Amendment narrowly failed to pass Congress with the requisite two-thirds majorities in 1876. The anti-Catholic Republican majorities in both houses of Congress had more than enough votes to subsequently require through enabling legislation that new applicants for statehood (such as Washington) include Blaine amendments in their state constitutions. See generally Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J. L. & Pub. Pol'y 657 (1998).

[3] The common denominator of "compelled support" clauses is language stating that no person shall be compelled to attend or support any church or religious ministry without his consent. Generally of an earlier derivation than the Blaine Amendments, these clauses disestablished state churches/religions by stripping them of their previous state – mandated support.

[4] Louisiana, Maine, and North Carolina.

these conflicts are particularly acute involves parental choice programs in education.

Increasing dissatisfaction with the current condition of America's public elementary and secondary education system, particularly in America's inner cities, where a huge proportion of minority students are educated in school districts whose performance can at best be described as dismal, has spawned an intense interest in educational alternatives. Among the most promising alternatives are reforms premised on parental choice, in which parents are empowered to select private schools for their children by receiving scholarships or vouchers.[5] Such reforms engender fierce opposition on the part of organizations, such as the teachers' unions, that have a stake in preserving the near monopoly that public school systems exercise by virtue of their provision of free education. One of their most common allegations against parental choice proposals is that such proposals violate state constitutional religion clauses like the Blaine Amendments and compelled support provisions. They routinely subject such programs to legal challenges under the Blaine Amendments, often disrupting the programs and the precious educational opportunities they provide.[6]

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[5] *Amici* include in this category tax credit programs that allow parents tax credits for private educational expenses or that help generate private scholarships by tax credits for donations to scholarship funds.

[6] For example, in 1994 the Puerto Rico Supreme Court invalidated an innovative parental choice program under its Blaine Amendment because it permitted parents to use scholarships to send their children to religious schools as well as private secular schools. *Association de Maestros v. Torres*, 137 D.P.R. 528, 1994 PR Sup. LEXIS 341 (1994).

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These allegations are premised on the same reasoning that opponents presented to this Court under the Establishment Clause in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). They interpret these provisions to prohibit aid to individuals who are given a free and independent choice of schools for their children to attend and who choose a religious provider, on the theory that the parents are inconsequential conduits of aid to the religious schools they've chosen. In essence, opponents of such programs equate aid to the families to aid given directly to the schools as schools.[7] A number of state supreme courts have in the past adopted this reasoning, sometimes conscious they were adopting a more restrictive approach than this Court has taken in analogous cases under the Establishment Clause.[8]

Similarly, in 1999, the Vermont Supreme Court reinterpreted the compelled support language in its constitution to prevent parents from selecting religious schools under its longstanding school choice program. *Chittenden Town Sch. Dist. v. Dep't of Ed.*, 738 A.2d 539 (Vt.), *cert. denied*, 528 U.S. 1066 (1999). Absent a definitive ruling from this Court that the Federal Constitution prohibits singling out religious schools and their patrons for adverse treatment, state parental choice programs will continue to be subjected to constant litigation reaching divergent results. See generally Bolick, *Voucher Wars: Waging the Legal Battle Over School Choice* (2003).

[7] *Amici* are not arguing that direct aid to religious schools is or is not constitutional – that issue, left open by *Mitchell v. Helms*, 530 U.S. 793 (2000), is not raised by this case.

[8] See *Visser v. Nooksack Valley Sch. Dist.*, 207 P.2d 198 (Wash. 1949); *McVey v. Hawkins*, 258 S.W.2d 927 (Mo. 1953); *Matthews v. Quinton*, 362 P.2d 932 (Alaska 1961); *State ex rel. Nussbaum*, 115 N.W.2d 761 (Wis. 1962); *Bd. of Ed. v. Antone*, 384 P.2d 911 (Okla. 1963); *Opinion of the Justices*, 216 A.2d 668 (Del. Sup. 1966); *Spears v. Honda*, 449 P.2d 130 (Haw. 1968); and *Epeldi v. Engelking*, 488 P.2d 860 (Idaho 1971), all disallowing the transportation of children to religious schools

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The Washington Supreme Court is the most notorious in this regard. In *Visser v. Nooksack Valley School Dist.*, 207 P.2d 198 (Wash. 1949), just two years after this Court held in *Everson* that states were subject to the federal religion clauses in a case upholding New Jersey's practice of subsidizing the transportation of all children to their schools, including religious schools, the Washington Supreme Court held that its Blaine Amendment forbade a similar program in Washington. Similarly, after this Court issued its unanimous Establishment Clause decision in *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986), holding that it was constitutional for Washington to allow Witters to pursue a religious vocation by attending a religious college with state assistance, but remanding the case to the Washington Supreme Court for a ruling on the effect of the Washington constitution, that court held that its Blaine Amendment prohibited Witters from using his entitlement at a religious college. *Witters v. Washington Comm'n for the Blind*, 771 P.2d 1119 (Wash.), *cert. denied*, 493 U.S. 850 (1989).

It is this state court interpretation of the Washington Blaine Amendment that has led to the case under consideration. Washington continues to treat aid given to

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under state religion clauses post-*Everson*. See *Gaffney v. Dep't of Ed.*, 220 N.W.2d 550 (Neb. 1974); *Pastor v. Tussey*, 512 S.W.2d 97 (Mo. 1974); *McDonald v. Sch. Bd.*, 246 N.W.2d 93 (S.D. 1976); *Bloom v. Sch. Comm.*, 379 N.E.2d 578 (Mass. 1978); *California Teachers Ass'n v. Riles*, 632 P.2d 953 (Cal. 1981); and *Fannin v. Williams*, 655 S.W.2d 480 (Ky. 1983), all disallowing free secular textbooks for children in religious schools under state religion clauses after this Court upheld a similar program under the Establishment Clause in *Bd. of Ed. v. Allen*, 392 U.S. 236 (1968).

individuals as aid to religious schools, even where the individuals choose such schools in a religiously-neutral program with a surfeit of secular choices. In so doing, Washington is applying a state constitutional provision that was designed to disadvantage Catholics in a way that now disadvantages all religions. This more "catholic" discrimination is equally repugnant to the principles of religious liberty incorporated into the U.S. Constitution, notwithstanding Washington's and its supporting *amici*'s attempts to justify its actions as simply a more rigorous and purportedly virtuous separation of church and state.

II. WASHINGTON'S BLAINE AMENDMENT CANNOT BE DIVORCED FROM ITS ANTECEDENTS IN RELIGIOUS BIGOTRY.

Members of this Court have recognized that state Blaine Amendments are not a benign expression of a desire for a stricter separation of church and state. Justice Thomas, writing for the four-member plurality in *Mitchell v. Helms*, 530 U.S. 793, 828 (2000), stated that "hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. . . . Consideration of the [Blaine] Amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general. And it was an open secret that 'sectarian' was a code word for 'Catholic.'" Similarly, the Arizona Supreme Court refused to apply its Blaine Amendment, which was modeled on Washington's, to a tax credit program, noting that "[t]he Blaine amendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the

contemporary Protestant establishment to counter what was perceived as a growing 'Catholic' menace." *Kotterman v. Killian*, 972 P.2d 606, 626 (Ariz. 1999).[9]

Petitioners, and particularly their *amici* Historians and Law Scholars on Behalf of Petitioners, seek to obfuscate and deny this well-established history. In an effort that can at best be characterized as disingenuous, those *amici* contend that the federal Blaine Amendment arose from a variety of factors of which anti-Catholicism was but one, and that there is no evidence that Washington's Blaine Amendment was motivated by anti-religious or anti-Catholic animus. Rather, they suggest that state constitution drafters, both before and after the failed effort to enact the federal Blaine Amendment, were "primarily concerned with the survival of the nascent public schools and in securing their financial security."[10]

What this analysis fails to put into proper perspective is that the "nascent public schools" these amendments sought to protect were in fact pervasively and intentionally Protestant institutions, hostile to the Catholic faith.[11] Protecting their monopoly over the use of state education

[9] The court went on to say that "we would be hard pressed to divorce the amendment's language from the insidious discriminatory intent that prompted it." *Id.*

[10] Brief *Amicus Curiae* of Historians and Law Scholars on Behalf of Petitioners at 17.

[11] See generally Jorgenson, *The State and the Non-Public School; 1825-1925* (1987); Gall, *The Past Should Not Shackle The Present: The Revival of a Legacy of Religious Bigotry By Opponents of School Choice*, 59 N.Y.U. Ann. Surv. Am. L. 413 (2003).

funds was hardly a religiously-neutral act in that context.[12]

Similarly, the absence of evidence regarding Anti-Catholicism in the debates on the Washington Constitution of 1889, in which the state Blaine Amendment language first appeared, is hardly dispositive of the question whether the Amendment was improperly motivated, because of the simple fact that the federal Enabling Act of 1889 *required* the state to establish a system of public schools free of sectarian control.[13] That Act effectively permitted the customary "nonsectarian" public schools (*i.e.*, generically Protestant public schools), while denying funding to "sectarian" Catholic schools.[14] That the federal government required Washington to incorporate the Blaine approach into its constitution in order to become a state simply means that the discriminatory motivation

[12] The *amici* do appear to concede that the public schools of the 19th century had a "Protestant nonsectarian complexion" (*Amici* Brief at 19) and that "nonsectarian" meant a "watered-down Protestantism" in which doctrines distinguishing sects of Protestants were not taught (*id.* at 18). They fail to draw the obvious conclusion, however, that the effort to preserve the public school monopoly on funds was thus a bigoted and hypocritical effort by the Protestant establishment to retain funds for its schools and deny funds to those of the Catholics.

[13] See Enabling Act, ch.180, section 4, 25 Stat. 676-77 (1889).

[14] The effort of Oregon in 1923, fueled by the Ku Klux Klan among others, to require that all schoolchildren attend public schools that led to this Court's decision in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), takes on a distinctly religious cast when one realizes that the public schools were generically Protestant.

existed at least at the federal level and possibly at the state level as well.[15]

This Court need not go so far as to invalidate Washington's Blaine Amendment *in toto*, but must overrule interpretations of it that conflict with federally-protected rights.[16] Given the current state of federal religion clause jurisprudence, some forms of direct assistance to religious schools *qua* schools would probably still fail to pass federal muster under *Mitchell v. Helms*, and can be similarly foreclosed by state Blaine Amendments. But denying assistance such as Promise Scholarships on a discriminatory basis, where individuals choose religious educational options and where such assistance is clearly permissible under the federal Constitution,[17] cannot be permitted.

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[15] In the analogous context of race discrimination, school districts that segregated African-American students pursuant to state law were not immune from suit if plaintiffs could not show evidence the district agreed with the state policy and would have adopted it without state coercion.

[16] After all, virtually all state religion clauses were adopted at a time when no one seriously thought the federal religion clauses applied to the states. Accordingly, they were usually intended to provide parallel protections to the Federal Constitution's guarantees of religious liberty. Thus, the failed federal Blaine Amendment itself contained language prohibiting state establishments of religion and protecting free exercise, before going on to forbid aid to sectarian institutions.

[17] Similar federal student assistance programs like the G.I. Bill, 38 U.S.C. § 3451 *et seq.*, Pell Grants, 20 U.S.C. § 1070 *et seq.*, and Guaranteed Student Loans, 20 U.S.C. § 1070a *et seq.*, do not exclude ministerial students or students majoring in theology. While virtually all states have student assistance programs similar in many respects to Washington's Promise Scholarships, Washington notes in its Petition for Certiorari that only 14 have statutes that prohibit using public funds to pay for a degree in theology. Pet. at 22.

III. WASHINGTON'S EFFORTS TO CONTROL AND CHANNEL THE FREE AND INDEPENDENT CHOICES OF INDIVIDUALS WITH RESPECT TO RELIGION VIOLATE THE FEDERAL CONSTITUTION.

A. Introduction

In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), this Court rebuffed Oregon's efforts to require that all its schoolchildren attend public schools. In doing so, the Court said:

> [W]e think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often hitherto pointed out, rights guaranteed by the constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional responsibilities.

268 U.S. at 534-35.

Amici believe it is this preexisting right to direct the education of their children that underpins and justifies distinguishing between programs in which governments provide assistance directly to schools and those in which assistance is provided to individuals or families to allow them to select schools. In the line of cases commencing

with *Everson*, 330 U.S. 1 (1947), continuing through *Board of Ed. v. Allen*, 392 U.S. 236 (1968), *Mueller v. Allen*, 463 U.S. 388 (1983), *Witters*, 474 U.S. 481 (1986), and *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993), and culminating in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), this Court has permitted the individual beneficiaries of government programs to select a religious education for themselves or their children, where "any aid . . . that ultimately flows to religious institutions does so only as a result of the genuinely free and independent choices of aid recipients." *Witters*, 474 U.S. at 487.

By excluding students pursuing theology degrees from religious colleges[18] Washington seeks to exercise "a general power to standardize its children by accepting instruction from [secular] teachers only." Petitioners argue that in limiting their program to secular instruction they are merely enforcing a more rigorous "separation" of church and state. But there can be no question that their actions place those persons wishing to pursue an education containing religious elements for themselves or their children at a significant disadvantage. Petitioners' position reflects a fundamental misunderstanding of their powers

[18] Some states such as Colorado exclude all students attending "pervasively religious" colleges from their student assistance programs, rather than just theology students at such colleges. See, for example, *Americans United for Separation of Church and State v. State of Colorado*, 648 P.2d 1072 (Colo. 1982) (upholding under Colorado's Blaine Amendment the inclusion of students at religiously-affiliated but not pervasively-sectarian colleges). These broader exclusions suffer from the same constitutional deficiencies as the narrower Washington exclusion because they discriminate on the basis of religion.

to discriminate against religious options and in favor of secular ones.

Petitioners, as well as those states that have similarly interpreted their religion clauses to preclude individual recipients of educational assistance from selecting religious educational providers,[19] have fundamentally misunderstood their role with respect to religion. This Court has made clear in its modern religion clause jurisprudence that government-operated schools must be secular, because for such schools to teach religion would reflect governmental endorsement and coerce individuals through the taxing power to support that endorsement.[20] This jurisprudence has of course resulted in the "de-religification" of the formerly Protestant public schools, a development *amici* have supported as a long overdue elimination of religious bias. But just because publicly-operated schools must be secular does not mean that *privately*-operated schools must be secular if their clientele benefits from public assistance. So long as government is not deliberately using individuals as a means of aiding religion (*i.e.*, not creating one of "the ingenious plans for channeling aid to sectarian schools that periodically reach this Court" (*Committee for Public Education v. Nyquist*, 413 U.S. 756, 785)), "the fact that aid goes to individuals means that the decision to support religious education is

[19] See note 7, *supra*, citing cases in which states have taken a non-parallel interpretation to circumvent this Court's interpretation of the Establishment Clause.

[20] See, e.g., *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963) (outlawing mandated prayer in public schools), and *Lee v. Weisman*, 505 U.S. 577 (1993) (outlawing school-sponsored prayer at graduation ceremonies).

made by the individual, not the State." *Witters*, 474 U.S. at 488. Under *Pierce* and *Meyer v. Nebraska*, 262 U.S. 390 (1923), parents are ultimately responsible for the education of their children and have every right to teach them, either directly or through surrogates, about religion, without the state questioning whether they are "indoctrinating" their offspring. Empowering parents, or individuals such as Joshua Davey, through a religiously-neutral program of financial assistance that allows them to effectively exercise their pre-existing right to direct their own or their children's education does not constitute state aid to religion.

B. Petitioners Wrongly Characterize the Ninth Circuit's Decision Below as Requiring the State To Subsidize Davey's Right To Pursue a Degree in Theology.

Citing *Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980); *Regan v. Taxation Without Representation*, 461 U.S. 540 (1983); *Rust v. Sullivan*, 500 U.S. 173; and *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), for the proposition that the government's decision not to fund the exercise of a fundamental right does not infringe that right, Petitioners contend that this case falls squarely within that category. Their argument fundamentally misunderstands those cases and the nature of what Washington has done in applying its Blaine Amendment to exclude Davey from the scholarship program's benefits. While nothing in the federal Constitution requires Washington to provide Promise Scholarships to any individuals at all, nor prevents Washington from funding individuals in specified classes defined by a religiously-neutral line such as whether they attend public

colleges or study engineering, Washington has excluded Davey pursuant to a line drawn on the basis of religion. He is excluded because he chose to pursue a religious vocation.

Just as the University of Missouri did not have to provide free meeting rooms to student groups in *Widmar v. Vincent*, 454 U.S. 263 (1981), once it did so this Court held that it could not deny such facilities to religious student groups, nor rely on its state Blaine Amendment as a justification for the discrimination. Similarly, just as the University of Virginia did not have to subsidize student publications in *Rosenberger v. Rectors & Visitors of the University of Virginia*, 515 U.S. 819 (1995), once it did so, this Court held that it could not refuse to fund publications taking a religious perspective.[21] Once Washington chose to provide scholarships for its residents attending colleges in Washington, it could not deny them scholarships on the basis of religion, nor can it justify such discrimination against religion in general on the basis of its Blaine Amendment.[22] In short, while Washington has no affirmative obligation to subsidize any of its citizens' rights to pursue particular degrees, once it starts

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[21] See also *Bd. of Ed. of Westside Comm. Schools v. Mergens*, 496 U.S. 226 (1990); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); and *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001).

[22] *Amici* cannot help from noting the irony that the Blaine Amendments, designed to preserve Protestant hegemony over the public schools and public fisc. against Catholic challenges, have transmuted over the years into engines for discrimination against religion in general.

subsidizing some of its citizens it becomes obligated not to deny subsidies to others on an unconstitutional basis.

Petitioners' reliance on the *Maher* line of cases misconstrues those decisions and their relationship to Washington's discriminatory classification scheme, as the Ninth Circuit correctly concluded below. While these cases quite properly distinguish between burdening a constitutional right, as occurred in *Meyer* and *Pierce*, and failing to subsidize one, they also recognize that the refusal to subsidize cannot be on the basis of a suspect classification. See, e.g., *Regan*, 461 U.S. 540, 548 (noting "[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to 'aim . . . at the suppression of dangerous ideas'") (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959)). In denying Davey the Promise Scholarship because he wished to major in theology taught from a religious perspective, Washington discriminates invidiously in its subsidies, treating the religious perspective as a dangerous idea requiring suppression.

In *Harris v. McRae*, 448 U.S. 297 (1980), the sequel to *Maher*, this Court rejected the claim that by funding childbirth services for indigent women the government violated equal protection principles by refusing to fund their abortions. Saying that "[t]he guarantee of equal protection . . . is a right to be free of invidious discrimination in statutory classifications and other governmental activity," 448 U.S. at 322, this Court held that financial need is not a constitutionally suspect classification subject to strict scrutiny. Religion, however, is a constitutionally

suspect classification,[23] and the free exercise of religion a constitutionally protected right. While in *Harris*, this Court held that Congress was permitted to "establish incentives that make childbirth a more attractive alternative than abortion for persons eligible for Medicaid," 448 U.S. at 324, Washington is not permitted to establish incentives that encourage students to pursue a secular education by discriminating against religion.[24]

Nor is the decision below a case involving government speech, as Petitioners and their *amici* seek to characterize it. By subsidizing the educations of the scholarship recipients, Washington is not itself the provider of the education, except where the recipients select a public college or university, in which case the Establishment Clause independently prohibits the state from teaching about religion or a particular religion from a viewpoint of religious truth. The Ninth Circuit below found that "pursuing a course of study of one's own choice" is part of "the expressive conduct, creative inquiry, and the free exchange of ideas [that] the educational enterprise is all about." *Davey v. Locke*,

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[23] See section III. F., *infra*.

[24] *Amici* are not arguing that Petitioners violate the constitution by discriminating on the basis of religion by funding and operating secular public schools and universities, because the Establishment Clause quite properly requires that such institutions be secular because the government is operating them. But where as here the government does not operate the institutions, the government has no right to encourage, nor rational basis for encouraging, individuals to choose secular schools or programs. The First Amendment is intended to keep the government neutral in matters of faith, not only by ensuring that governmental institutions be religiously-neutral, but also by ensuring that government not encourage or discourage private choices that may be influenced by religion.

299 F.3d 748, 755 (2002). The state has no more business encouraging students to approach religion from a secular viewpoint in theology majors than it would in encouraging them to approach religion classes from a religious viewpoint.

C. The Ninth Circuit Correctly Held That Washington Violated Davey's Right to Free Exercise of Religion.

It is often the case that a classification made on a prohibited basis violates multiple federal constitutional protections. Cases such as this one involving discrimination based on religion frequently do so, because religion is not only the special concern of the First Amendment's two religion clauses, see, e.g., *Everson*, 330 U.S. 1 (1947) (Establishment Clause), and *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (Free Exercise Clause), but also frequently involves speech implicating the Free Speech Clause, see, e.g., *Rosenberger*, 515 U.S. 819 (1995), and constitutes a suspect classification for purposes of the Fourteenth Amendment's Equal Protection Clause, see, e.g., *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951).[25] Washington's efforts to exclude Davey for choosing to pursue a religion major at a religious college violates all of these provisions. The Ninth Circuit's decision focuses primarily on the Free Exercise

[25] See also *United States v. Armstrong*, 517 U.S. 687, 716 (1996); *Bd. of Ed. v. Grumet*, 512 U.S. 687, 715 (1994); *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 650 (1992); and Volokh, *Equal Treatment Is Not Establishment*, 13 Notre Dame J. L. & Pol. 341 (1999).

Clause and correctly concludes that Washington violates the clause through application of its Blaine Amendment.

In *Lukumi*, 508 U.S. 520 (1993), Justice Kennedy opened his opinion for the Court by saying, "The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions." 508 U.S. at 520. In that case, this Court concluded that the challenged laws had an impermissible object, the suppression of Santeria religious practices, and pursued their asserted secular ends only with respect to conduct motivated by religious belief. In the case under review, the interpretation of the Washington Constitution and its implementation in Wash. Rev. Code section 28B.10.814[26] differs from the city of Hialeah's actions in only two ways: first, in seeking to suppress religion in general rather than a particular religion; and second, in doing so overtly rather than trying to camouflage its motives in secular garb. Surely these differences cannot be a basis justifying a different outcome.

Washington treats all religions alike in denying their adherents aid if pursuing a theology/religion degree.[27] The only religion majors the state will fund are those pursuing their studies from a secular point of view. Washington

[26] That section provides in relevant part that "[n]o aid shall be provided to any student who is pursuing a degree in theology."

[27] As this Court said in *Lukumi*, "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some *or all* religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." 508 U.S. at 532 (emphasis added).

makes no efforts to hide that this is what it is doing; instead, it seeks to justify its actions as implementing the more thoroughgoing separation of church and state supposedly mandated by its constitution. Tennessee offered a similar rationale for denying ministers the right to participate as legislators and delegates to constitutional conventions, a position this Court rejected as violating the First Amendment in *McDaniel v. Paty*, 435 U.S. 618 (1978). As Justice Brennan said in his concurring opinion in *McDaniel*, the Free Exercise Clause was violated because "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits." 435 U.S. at 639 (Brennan, J., concurring). See also *Employment Division v. Smith*, 494 U.S. 872, 877 (1990), in which this Court said that under the Free Exercise Clause "[t]he government may not . . . impose special disabilities on the basis of religious views or religious status." Unlike *Smith*, which involved secular objectives pursued using religion-neutral criteria, in this case Washington uses religious criteria to pursue an objective that is anything but religiously-neutral. It puts individuals pursuing religious studies from a religious perspective at a disadvantage against individuals pursuing all other studies, including religious studies from a secular perspective.

D. Washington Violates the Free Speech Clause By Engaging in Viewpoint Discrimination When It Excludes Theology Majors.

Education is essentially speech. It is communication between teachers and students, usually occurring in the confines of a school or college. Just as the Free Speech Clause prevents government from banning private schools,

it prevents government from banning religious schools. In *Griswold v. Connecticut*, 381 U.S. 479, 482-83, this Court said that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and the press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach – indeed, the freedom of the entire university community." *Rosenberger* applied these free speech principles to government action subsidizing secular viewpoints but denying equal treatment to religious viewpoints. Just as the University of Virginia was under no obligation to subsidize any viewpoints, but couldn't exclude those that were religious once it undertook to subsidize all others, so Washington, having undertaken to subsidize theology classes and majors taught from a secular viewpoint, cannot refuse to subsidize Davey's choice of theology taught from a religious viewpoint.

By excluding otherwise qualified students of theology from a merit-based program whose purpose is not to advance any particular field of knowledge, Washington has also violated Davey's academic freedom as protected by the Free Speech Clause. "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J., concurring). Academic freedom properly functions to prevent the government from influencing the marketplace of ideas by invidiously supporting or disfavoring particular viewpoints. It denies the government's authority to limit, burden, or otherwise discourage citizens' access to readily available information, unless

that information is itself unprotected by the First Amendment. See *United States v. American Library Ass'n*, 123 S. Ct. 2297 (2003).

Davey was denied his scholarship for no reason other than that the government has singled out theological studies for special disfavor. In so doing, Washington artificially burdens the choice of any scholarship recipient who might desire to study theology, thereby violating the principle of academic freedom. Washington's limitation vis-à-vis theology programs plainly interferes with the free "marketplace of ideas" that academic freedom is intended to promote and protect.[28]

E. Washington Violates the Establishment Clause By Inhibiting Religion.

Ever since *Everson*, this Court's initial application of its religion clause jurisprudence to the states, this Court has recognized that the religious neutrality mandated by the Establishment Clause requires evenhanded treatment of religion and non-religion, not just an absence of a preference for one religion or another. "[The First Amendment] requires the state to be a neutral in its relations with groups of believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them." *Everson*, 330 U.S. at 18. Yet handicapping

[28] See *Healy v. James*, 408 U.S. 169, 180-81 (1972) ("the college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new ground in reaffirming this Nation's dedication to academic freedom").

religion is precisely what Washington has sought to do in this case.

Religious neutrality is, of course, the underpinning of this Court's longstanding *Lemon* test for assessing Establishment Clause cases.[29] While that test has undergone restatement in recent years, see *Agostini v. Felton*, 521 U.S. 203 (1997), its core of evenhandedness has remained intact – government may not engage in actions that have the primary effect of advancing *or inhibiting* religion. Nor, under the "endorsement" aspect of the test, may government express endorsement *or disapproval* of religion.[30] In this case, Washington's interpretation and application of its Blaine Amendment plainly has the primary effect of inhibiting religion and clearly conveys an unmistakable message of disapproval.

If a private school student such as Joshua Davey wants to pursue a theology major, as opposed to any other major under the sun, then he must give up his entitlement to the Promise Scholarship. It is solely because theology involves religion that this occurs, and places religion at a disadvantage vis-à-vis non-religion. If Davey desired to

[29] In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court formulated the test for programs under the Establishment Clause as requiring that a program have a secular legislative purpose, have a primary effect that neither advances *nor inhibits* religion, and not foster excessive governmental entanglement with religion.

[30] E.g., *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 778 (1995) (O'Connor, J., concurring in the judgment); *Bd. of Ed. v. Grumet*, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring in part and concurring in the judgment); *Bd. of Ed. v. Mergens*, 496 U.S. 226, 249 (1990); *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987); and *Wallace v. Jaffree*, 472 U.S. 38, 56 (1984).

study sociology or economics from a Marxist point of view (including one that taught Marxism as "truth") and learn how religion is the opiate of the masses, he could do so without risking his Promise Scholarship. This result is far removed from some abstract notion of the separation of church and state. It has a primary effect of disadvantaging religion in the marketplace of ideas that is the university.[31] In exactly the same way that the Blaine Amendments were intended to preserve the advantages of the Protestant (public) schools over their Catholic (non-public) counterparts, Washington's Blaine Amendment now serves to preserve the advantages of non-religion over religion by channeling the choices of individuals toward non-religious majors and away from religious ones. The Establishment Clause cannot permit this.

F. Washington's Discrimination Based on Religion Violates the Equal Protection Clause.

The Equal Protection Clause, by designating certain classifications as suspect and strictly scrutinizing them, asserts that certain characteristics should not be the basis for governmental action. This Court has often said that religious discrimination violates the Equal Protection Clause.[32] *Amici* believe that religion should constitute a

[31] It is as if in *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), the federal government could subsidize the art of Robert Mapplethorpe and Andres Serrano disparaging Christianity, but deny funding to any artist painting from a religious perspective.

[32] See, e.g., *United States v. Armstrong*, 517 U.S. 687, 715 (1996); *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 650 (1992); *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951); and *American Sugar Refining Co. v. Louisiana*, 179 U.S. 89, 92 (1900).

suspect classification in the circumstances of this case, and that Washington cannot provide a compelling justification for discriminating against religion.

Though this Court has in modern days gone far towards reducing government-sponsored religious discrimination, there can be no serious question but that the history of public education in the states (where the plenary authority for education resides) is replete with examples of religious bias, of which the Blaine Amendments are but one aspect. Were this not the case, this Court would never have been called upon to adjudicate so many Establishment Clause cases. In many circumstances, the Equal Protection Clause presents a straightforward way of identifying and rectifying religious discrimination, in much the same way that the Clause has dealt with the prevalence of race discrimination.[33] Particularly in programs providing assistance to individuals or families rather than institutions where the concerns of government sponsorship or endorsement of religion are

[33] Some of the confusion characterizing this Court's religion clause jurisprudence might be dispelled by use of equal protection analysis. For example, *Sherbert v. Verner*, 374 U.S. 398 (1963); *Thomas v. Review Bd.*, 450 U.S. 707 (1981); and *Hobbie v. Unemployment Appeals Comm.*, 480 U.S. 136 (1987), might appear to be inconsistent with *Employment Div. v. Smith*, 492 U.S. 872 (1990) (holding that a classification must be based upon religion to be actionable under the religion clauses). This has resulted in the *Sherbert* line of cases as being viewed as exceptions requiring neutral rules to accommodate religion. They could, however, also be viewed as discrimination cases, to the extent that non-religious excuses for failing to meet the religion-neutral requirements were accepted while religious excuses were not. Similarly, *Walz v. Tax Comm.*, 397 U.S. 664 (1970), upholding tax exemptions for church property, can be analyzed as a case refusing to single out religious institutions from the class of institutions afforded tax relief.

attenuated by independent private choices, review of the Equal Protection Clause makes sense.[34] Washington's action in denying Davey a Promise Scholarship based upon the religious nature of the program he freely chose violated his right to the equal protection of the laws.[35]

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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[34] If government refused to supply religious institutions with police and fire protection because they were religious, one can easily see an equal protection problem. Similarly, for New Jersey to provide free transportation to students in all schools but religious ones (*Everson*) or New York to supply free secular textbooks to all students but those attending religious schools (*Allen*) would constitute religious discrimination under the Clause.

[35] Any suggestion that the federalism principles underlying the Federal Constitution should permit the states greater leeway to experiment with a more rigorous separation of church and state is as mistaken as the idea that federalism should permit the states more leeway in discriminating on the basis of race.

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No. 02-1315

IN THE
Supreme Court of the United States

GARY LOCKE,
GOVERNOR OF THE STATE OF WASHINGTON, ET AL.,
Petitioners.

v.

JOSHUA DAVEY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF LIBERTY COUNSEL AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

Liberty Counsel is a non-profit civil liberties education and legal defense organization.[1] Liberty Counsel provides education and legal representation regarding the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment to the United States Constitution. Attorney Mathew D. Staver and Liberty Counsel have been involved in several cases where there was a clash between state laws and the federal constitution. In those cases, Liberty Counsel has successfully defended against arguments made by governmental entities that the state law constituted a compelling interest sufficient to justify discriminatory treatment of religious speech and beliefs. *See, e.g., Deida v. City of Milwaukee*, 206 F. Supp.2d 967 (E.D. Wis. 2002) (state law prohibiting leafletting of parked cars); *Falwell v. Miller*, 203 F. Supp.2d 624 (W.D. Va. 2002) (state constitutional provision prohibiting incorporation by churches).

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[1] Liberty Counsel files this brief with the consent of all parties. The letters granting consent are enclosed with this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

Article VI, clause 2 of the United States Constitution provides that federal constitutional rights preempt conflicting state constitutional provisions. As applied to this case, the Ninth Circuit Court of Appeals properly concluded that "a state's broader prohibition on governmental establishment of religion is limited by the Free Exercise Clause of the federal constitution." Pet. App. 27a. This Court should affirm the decision of the Ninth Circuit, finding that the discriminatory state restrictions on the use of Promise Scholarship funds for those pursuing theology majors unconstitutionally violated Davey's right to free exercise of religion.

ARGUMENT

A.

The Free Exercise Clause of the First Amendment Trumps Washington's Conflicting State Laws.

Article VI, clause 2 of the United States Constitution provides that "[t]his Constitution . . . shall be the supreme Law of the Land; . . . any Thing in the Constitutions or Laws of any State to the Contrary notwithstanding." Not surprisingly, therefore, this Court has repeatedly rejected the argument that compliance with a state law constitutes a compelling interest sufficient to justify infringement of a federal constitutional right. *See, e.g., Good News v. Milford Central School*, 533 U.S. 98, 107 n.2 (2001) ("Because we hold that the exclusion of the Club on the basis of its religious perspective constitutes unconstitutional viewpoint discrimination, it is no defense for Milford that purely religious purposes can be excluded under state law"); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 299 (1989) (O'Connor J., concurring in part and dissenting in part) ("The applicability of a provision of the Constitution has never depended on the vagaries of state or federal law"); *Widmar v. Vincent*, 454 U.S. 263 (1981); *McDaniel v. Paty*, 435 U.S. 618 (1978); *Cooper v. Aaron*, 358 U.S. 1 (1958). The effort by the State of Arkansas to undermine this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954) is a vivid reminder of the significance of the supremacy clause.

In 1954, this Court decided that forced racial segregation in State public schools was a denial of the equal protection of the laws, enjoined by the Fourteenth Amendment of our United States Constitution. *Cooper v. Aaron*, 358 U.S. 1, 5 (1958) (citing *Brown v. Board of Education*, 347 U.S. 483 (1954)). In response to this decision, the State of Arkansas passed an amendment to its State Constitution, commanding the Arkansas's General Assembly to oppose the desegregation decisions of this Court. *Cooper*, 358 U.S. at 8-9. Despite state efforts to undermine *Brown*, the Little Rock District School Board instituted administrative measures designed to desegregate the public school system in Little Rock. *Id.* at 7, 9.

On September 2, 1957, the day before desegregation was to begin in Little Rock, the Governor dispatched Arkansas National Guard units to Little Rock's Central High School. *Id.* at 9. The national guard placed the school grounds "off limits" to "colored" students. *Id.* After a series of similar events, the school board filed a petition in District Court seeking postponement of its desegregation program. *Id.* The District Court granted the relief, finding that "chaos, bedlam and turmoil" had caused and would continue to cause "serious financial burden" on the school district. *Id.* at 13. The District Court also found that the education of the students had suffered and would continue to suffer under the existing conditions. *Id.* at 13.

The Eighth Circuit reversed and this Court affirmed. *Id.* at 14. In its affirmance, this Court held that the constitutional rights at issue were not to be "sacrificed or yielded" to the

actions of the Arkansas Governor or Arkansas Legislature. *Id.* "The controlling legal principles are plain . . . ." *Id.* "The command of the Fourteenth Amendment is that no 'State' shall deny to any person within its jurisdiction the equal protection of the laws." *Id.* "In short," opined this Court,

> the constitutional right of children not to be discriminated against in school admission on the grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes ....

Id. at 17 (citation omitted).

In rejecting the State's contention that it was not bound by the Court's holding in *Brown*, this Court revisited "some basic constitutional propositions." *Id.* Significantly, this Court acknowledged that it was "settled doctrine" that Article VI of the United States Constitution (known as the "Supremacy Clause") makes the Constitution the "supreme Law of the Land." *Id.* at 18. Article VI, clause 2 makes the United States Constitution of binding effect on the States "'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'" *Id.*

Thus, state constitutions cannot subtract or detract from the rights guaranteed by the Constitution. *See e.g., Reynolds v. Sims*, 377 U.S. 533, 581(1964) (stating that where there is an unavoidable conflict between the federal and state constitutions, the Supremacy Clause controls). That constitutional principle applies equally to a state's responsibility and undertaking of public education. *Cooper*, 358 U.S. at 19; *see also Brown v. Board of Education*, 347 U.S. at 493 (while it is true that the responsibility of public education is primarily the concern of the states, "it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal

constitutional requirements as they apply to state action").

The federal constitutional right before this Court is that of Davey's right to free exercise of religion and the burden placed on that federal right by the State's laws. Specifically, the state constitution provides that "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment." Article I, § 11. The Washington Rev. Code further provides that the Promise Scholarship cannot be awarded "to any student who is pursuing a degree in theology." Wash. Rev. Code section 28B.10.814. This case, therefore, pits a state law that provides for a broader "separation of church and state" than that of the federal constitution against the First Amendment right of free exercise.

In the past, this Court has struggled to find a neutral course between the two religion clauses, "both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with each other." *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970) (holding property tax exemptions to religious organizations constitutional). On the one hand, the First Amendment "does not say that in every and all respects there shall be a separation of Church and State." *Id.* (quoting *Zorach v. Clauson*, 343 U.S. 306, 312 (1952)). In fact, "[n]o perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts - one that seeks to mark boundaries to avoid excessive entanglement." *Walz*, 397 U.S. at 669. The objective, then, is one of balance. The Washington constitutional provision tramples upon that balance.

In this case, Washington has discriminated against Promise Scholarship recipients who desire to major in theology, if that instruction "resembles worship and manifests devotion to religion and religious principles in thought, feeling, belief, and conduct." Pet. Br. at 22-23. The State does not dispute that it discriminates against Promise Scholarship recipients who wish to major in theology taught from a perspective that

presents the Bible as truth. Rather, the State argues that its state interest in achieving a broad separation of church and state constitutes a compelling justification for its discriminatory treatment of those students pursuing a theology degree. This Court's precedent demonstrates the lack of merit in Petitioners' argument.

In *Widmar*, the University of Missouri had a policy that prohibited use of university facilities "for purposes of religious worship or religious teaching" while permitting a wide variety of secular uses. 454 U.S. at 265. Pursuant to the policy, the university refused to allow a student religious group use of the university facilities. In striking down the policy, this Court held that the state's interest in providing "greater separation of church and state than is already ensured under the Establishment Clause of the Federal Constitution" is not "sufficiently 'compelling' to justify content-based discrimination against respondents' religious speech." *Id.* at 278. In other words, the state's interest was "limited by the Free Exercise Clause and . . . the Free Speech Clause . . . ." *Id.* at 277-78.

This Court came to the same conclusion in *McDaniel v. Paty*, 435 U.S. 618 (1978). In *McDaniel*, the Tennessee constitution contained a provision that disqualified ministers from serving as legislators. Specifically, it stated that "no minister of the gospel, or priest of any denomination whatever, shall be eligible to a seat in either House of the legislature." Tenn. Const., Art. VIII, § 1 (1796). This Court held that the state constitutional provision violated the federal constitutional rights of ministers.

> [T]he right to the free exercise of religion unquestionably encompasses the right to preach, proselyte, and perform other similar religious functions, or, in other words, to be a minister of the type McDaniel was found to be. . . . Yet, under the clergy-disqualification provision,

> McDaniel cannot exercise both rights simultaneously because the State has conditioned the exercise of one on the surrender of the other. Or, in James Madison's words, the State is 'punishing a religious profession with the privation of a civil right.' In so doing, Tennessee has encroached upon McDaniel's right to the free exercise of religion. 'To condition the availability of benefits including access to the ballot upon this appellant's willingness to violate a cardinal principle of his religious faith by surrendering his religiously impelled ministry effectively penalizes the free exercise of his constitutional liberties.

McDaniel, 435 U.S. at 626. "If appellant were to renounce his ministry, presumably he could regain eligibility for elective office, but if he does not, he must forgo an opportunity for political participation he otherwise would enjoy." *Id.* at 634 (Brennan, J., concurring). Because the "provision imposes a unique disability upon those who exhibit a defined level of intensity of involvement in protected religious activity. . . . [it] compels the conclusion that it violates the Free Exercise Clause." *Id.* at 632. *See also Falwell v. Miller*, 203 F.Supp.2d 624, 631 (W.D. Va. 2002) (finding the Virginia constitutional provision that prohibited incorporation of a church in violation of the free exercise clause of the First Amendment); *People v. Andrews*, 176 N.W.2d 460 (Wis. 1970) (finding state constitutional provision making search and seizure provision inapplicable to certain evidence held void).

So too, here, do the Washington laws impose a unique disability upon those who exhibit a defined level of intensity of involvement in protected religious activity – namely, the right to pursue a theology degree from a perspective of Biblical truth. If Davey were to renounce his intention to pursue a theology degree, he would be eligible to receive the Promise Scholarship.

Accordingly, as in *McDaniel*, this Court should conclude that the state laws violate Davey's right to Free Exercise of religion. The Ninth Circuit's decision should be affirmed.

B.

Washington's Laws Violate The Establishment Clause.

The Washington laws also violate the First Amendment Establishment Clause. Petitioners argue that their State constitution forbids awarding Promise Scholarships to theology majors *if* the theology courses present the Bible as "truth." Thus, the State not only entangles itself in religious beliefs and doctrine, but is decidedly hostile toward religion. The First Amendment to the United States constitution requires the State to award Promise Scholarships on a religion-neutral basis, neither punishing nor rewarding religious beliefs.

Under the First Amendment, Washington State is constitutionally forbidden from enacting a law with the "purpose" or "effect" of inhibiting religion. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 648-49 (2002) (stating that the Establishment Clause of the First Amendment, applied to the States through the Fourteenth Amendment, prevents a State from enacting laws that have the "purpose" or "effect" of advancing *or inhibiting* religion) (emphasis added) (citing *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997)). Also under the First Amendment, the State is prohibited from enacting a law whose effect or purpose conveys a message of hostility toward religion. *See Lynch v. Donnelly*, 465 U.S. 668, 690-91 (1984) (O'Connor, J., concurring) (finding that the proper inquiry was whether the government intended to convey a message of endorsement *or disapproval* of religion) (emphasis added); *see also Good News Club v. Milford Central School*, 533 U.S. 98, 114, 118 (2001) (stating that a significant factor in upholding governmental programs in the face of an Establishment Clause attack is their *neutrality* towards religion,

and finding that the danger that children would misperceive the endorsement of religion was no greater than the danger that they would perceive a hostility toward a religious viewpoint, if the Club were excluded).

Under the auspices of the Washington State constitution, the State has enacted a policy which is decidedly *not* neutral toward religion. The State has singled out for discrimination any student who declares a major in theology *if* that major is taught from a religious perspective. Pet. Br. at 17. The Promise Scholarship program is unconstitutionally hostile toward religion.

The State laws also excessively entangle the State in religious matters. Drawing the distinction between those theology degrees pursued from the perspective of devotion to religion, from those that do not, requires the State – and ultimately the courts – to inquire into the "significance of words and practices of different religious faiths, and in varying circumstances by the same faith." *Widmar v. Vincent*, 454 U.S. 263, 270 n. 6 (1981). As this Court has held, "[s]uch inquiries . . . tend inevitably to entangle the State with religion in a manner forbidden by our cases." *Id.* (quoting *Walz*, 397 U.S. at 668). Indeed, Petitioners must have engaged in that religious inquiry in order to reach the conclusion that "Davey's coursework . . . was taught from a viewpoint that the Bible represents 'truth,' and is 'foundational,' as opposed to a purely academic study of the Bible." Appellees' Petition for Rehearing and Petition for Rehearing En Banc at 5. Such an inquiry necessarily entangles government with religion.

Petitioners miss the mark in suggesting that the State does not entangle itself with, or discriminate against, religion because it requires the school, rather than the State, to determine whether the student is pursuing an impermissible degree in theology. Pet. Br. at 8. Forcing schools to identify theology students who are not eligible for receipt of State scholarships does not cleanse the State of its discriminatory intent or of its hostility toward religion and religious adherents.

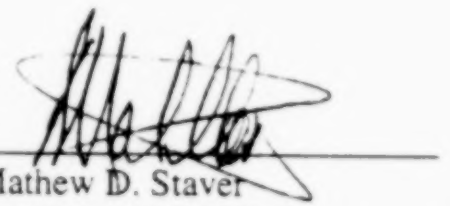
Under this Court's jurisprudence, it is irrelevant whether the State nullifies the right of students to equal educational opportunity openly and directly, or indirectly by "evasive schemes." *See Cooper v. Aaron*, 358 U.S. 1, 17 (1958).

Petitioners also miss the mark in arguing that the State is not required to subsidize Respondent's constitutional right to pursue a theology degree. Pet. Br. at 22. While it is true that Petitioners are not constitutionally mandated to offer Promise Scholarships, once Petitioners embark in offering such educational opportunities, Petitioners are constitutionally required to offer and administer the scholarships in a religion-neutral manner. Offering the scholarships in a religion-neutral manner, but then revoking the scholarships if the recipient chooses to major in a certain type of theology is not "religion-neutral." "A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion, favoring neither one religion over others nor religious adherents collectively over nonadherents." *Board of Educ. v. Grumet*, 512 U.S. 687, 696 (1994) (citing *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792, 793 (1973)). Washington's laws prohibiting receipt of a Promise Scholarship by students pursuing theology degrees violates that "proper respect . . . of neutrality toward religion" in violation of the establishment clause and of Davey's right to free exercise of religion.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,



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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF BLACK ALLIANCE FOR EDUCATIONAL OPTIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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IN THE

Supreme Court of the United States

No. 02-1315

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, *et al.*,
Petitioners,

v.

JOSHUA DAVEY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF BLACK ALLIANCE FOR EDUCATIONAL OPTIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

This brief is filed on behalf of the Black Alliance for Educational Options as amicus curiae in support of respondent.[1]

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than the Black Alliance for Educational Options, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. *Amicus* has obtained the written consent of all parties, through their respective counsel, for the filing of this brief.

INTEREST OF *AMICUS*

The Black Alliance for Educational Options ("BAEO") is a non-profit, intergenerational organization of educators, parents, students, community activists, public officials, religious leaders, and business people. BAEO's mission is to actively support parental choice to empower families and increase educational options for black children. While supporting choice for all families, BAEO focuses on the needs of low income and working class families. Low-income parents—principally blacks and Hispanics—have less access than middle- and upper-income parents to high-quality teachers and schools. Low-income parents are also less satisfied than middle- and upper-income parents with the schools that are available to their children. This lack of access to educational opportunities contributes to the widening gap between poor black children and whites on virtually all indicators of academic achievement. BAEO believes that the American ideal of equal opportunity is unattainable for economically disadvantaged black children so long as they continue to lag far behind national averages.

BAEO works to inform the general public about parental-choice initiatives; to educate black families about the various educational options available to them; to create, promote, and support efforts to enable black parents to exercise choice; and to heighten public awareness of efforts to reduce or limit educational options. BAEO partners with other organizations to expand educational options and empower low-income parents, enabling those parents to choose the learning environments that are best for their children.

BAEO filed an amicus brief, and firmly supports this Court's decision, in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), both as a matter of constitutional law and as a matter

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Petitioners' consent letter is being filed concurrently with this brief. Respondent's consent letter is on file with the Court.

of educational policy. *Zelman* offers a ray of hope for low income and minority students. Studies published both before and after *Zelman* indicate that school choice programs have had a positive educational impact, particularly for African-American children.

BAEO is vitally interested in the outcome of this litigation not because its members have any particular interest in furthering religious belief or observance, but because religious schools in the urban centers may provide the only available private education alternative. *Cf. Zelman*, 536 U.S. at 647, 658 (96% of scholarship recipients enrolled in religious schools). Although this case does not involve a voucher plan for primary schools, it does involve a voucher plan for students seeking higher education in the State of Washington—a context where presumably there should fewer, not greater, scruples about state "support" of religion. Yet, here, Washington law enacted against the backdrop of nineteenth-century state constitutional provisions borne of hostility to particular religions, allows students to use their scholarships for virtually any college program save the study of theology in a religiously supported college.

BAEO's concern is that a failure to affirm the judgment below will lead opponents of school choice to invoke perceived state constitutional barriers so as to preclude these valuable experiments, still in their infancy, from brightening the prospects of our children who need a variety of options to give them the best chance to receive a quality education. If such barriers successfully can be raised, as one commentator

has noted, "the school voucher movement will be effectively dead as a serious option in reforming education." [2]

STATEMENT OF THE CASE

In 1999, the State of Washington created a "Promise Scholarship" program. The program provides state financial aid to students graduating from public or private high schools in the state who meet certain criteria. The regulations implementing the program are codified in the Washington Administrative Code at sections 250-80-010 *et seq*. JA 178-87.[3]

In this case, it is undisputed that the college respondent attended was an "eligible postsecondary institution"; respondent was an eligible scholarship recipient; and theology, his declared major, would have been an eligible course of study were it taught from a non-religious perspective. Respondent was denied a Promise Scholarship because the regulations require certification that the student "[i]s not pursuing a degree in theology." JA 180. This provision mirrors a section of the Washington Revised Code which provides: "No aid shall be awarded to any student who is pursuing a degree in theology." Wash.Rev.Code §28B.10.814. The statutory provision, in turn, purportedly implements provisions of the Washington constitution that prohibit the expenditure of public funds on "sectarian" education:

> "No public money or property shall be appropriated for, or applied to any religious worship, exercise or instruction . . . ." Washington Const., Art. I, § 11
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> * * * *

[2] *See* Mark Edward DeForrest, AN OVERVIEW AND EVALUATION OF STATE BLAINE AMENDMENTS: ORIGIN, SCOPE, AND FIRST AMENDMENT CONCERNS, 26 Harv. J.L. & Pub. Pol'y 551, 554 (2003) (hereafter "DeForrest").

[3] We cite to the parties' Joint Appendix as "JA __."

> "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence." Washington Const., Art. 9, § 4.

In 1999, respondent Joshua Davey applied for a Promise Scholarship during his senior year in high school. He met the academic and income requirements. JA 41. In August 1999 he was notified that he was eligible to receive the scholarship. JA 53-54.

In August 1999 Davey enrolled at Northwest College, an eligible postsecondary institution under the Promise Scholarship regulations. JA 43. He chose to pursue a double major in "pastoral ministries" and "business management/ administration." JA 43. In October 1999, Davey was informed by Northwest College officials that his chosen course of study disqualified him from receiving his Promise Scholarship money. JA 45.

In January 2000, Davey filed this lawsuit in the federal District Court for the Western District of Washington, contending that his rights under the First and Fourteenth Amendments to the U.S. Constitution and cognate rights under the Washington constitution had been violated. JA 4-24. Davey sought damages, injunctive relief, and a declaration stating that Washington's denial of state aid to students pursuing a degree in theology was unconstitutional. JA 20-21. The district court denied Davey's motion for a preliminary injunction, and ultimately granted summary judgment in favor of the Petitioners. JA 75-81, 170.

The Ninth Circuit reversed. Judge Rymer's opinion for the majority noted that the Promise Scholarship program expressly discriminates against religion: "Both the statute and [agency] implementing policy refer on their face to religion. The Promise Scholarship program is administered so as to disqualify only students who pursue a degree in theology from receiving its benefit." *Davey v. Locke*, 299 F.3d 748, 753 (9th Cir. 2002). This was a form of viewpoint-based

discrimination, the majority ruled, requiring strict scrutiny under the Free Exercise Clause of the First Amendment; and Washington lacked any legitimate interest in excluding religious study from its otherwise comprehensive scholarship program. In contrast, the dissenting judge argued that there could be no constitutional violation, as the State has no obligation to fund any particular course of study. *Id.* at 761.

SUMMARY OF ARGUMENT

This case does not present the question of whether or not students have an *affirmative* constitutional right to a publicly funded education at a private school. Neither Respondent nor BAEO quarrels here with the proposition that, as a general matter, the states are not constitutionally compelled to fund students pursuing their education in private schools.

This case is about the *negative*, defensive right to be free of discrimination against religion. Where, as here, the State establishes a comprehensive program by which it chooses to fund private educational options, it may not, consistent with the obligation of even-handedness inhering in both the First Amendment and Equal Protection Clauses, selectively refuse to provide funding for otherwise eligible students opting for a private religious education.

a. Discrimination against religious education in otherwise comprehensive state educational funding programs is prohibited by the Free Exercise and Free Speech Clauses of the First Amendment and by the Equal Protection Clause of the Fourteenth Amendment. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct *because it is undertaken for religious reasons*." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (emphasis added). The State may not discriminate against *the religiously motivated*—even when it claims it is doing so to promote the values of the Establishment Clause or some analogous state constitutional

provision. *See, e.g., Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 837-46 (1995); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 393-94 (1993); *Widmar v. Vincent*, 454 U.S. 263, 275-78 (1981).

Here, Washington has chosen to exclude students pursuing a major in theology at an otherwise eligible institution of higher education, presumably because it wants to erect its own particularly high wall of separation between church and state. But this is not an adequate justification for invidious discrimination against religion. The State can choose not to fund private schools at all, but it cannot withhold from religious schools the assistance it is prepared to extend to all other private schools comparably situated, without violating the core nondiscrimination guarantee of the Free Exercise and Equal Protection Clauses.

b. Invidious discrimination against religion is particularly transparent in this case. The State of Washington's prohibition of financial aid to theology majors presumably furthers the separationist principles enshrined in the State constitution's so-called "Blaine Amendments," with their "shameful pedigree" rooted in "pervasive hostility" to religion. *Mitchell v. Helms*, 530 U.S. 793, 828 (2000). Blaine Amendments are an enduring legal legacy of the anti-Catholic bigotry that pock-marked much of nineteen-century U.S. history. These laws prohibit the public funding of "sectarian" schools, understood at the time as a thinly veiled code for Catholic schools.

Under *Romer v. Evans*, 517 U.S. 620, 634 (1996), laws rooted in hostility to a particular group—particularly, laws that prevent the possibility of evolutionary improvements for the group by ordinary legislation, as here—violate the Equal Protection Clause, even if the group would not ordinarily qualify for "suspect category" classification warranting strict judicial scrutiny.

c. School choice programs of the sort approved in *Zelman* particularly benefit the minority and low-income children whose interests BAEO seeks to protect. For these children, equality of opportunity depends on their ability to secure a quality education, and if this cannot be provided by the public schools, they should have access to the available private alternatives, rather than have such options blocked off by state constitutional scruples rooted in hostility to religion. During its first two years of operation, sixty-eight percent of the scholarship recipients in the Cleveland Pilot Program sustained in *Zelman* were African-American.[4]

A growing body of research suggests that vouchers are having a positive impact on participating students and their families (largely African-Americans) and on the public school systems that now are required to compete for students.[5] Although the programs are still in their infancy and the studies reporting progress are preliminary, the results achieved thus far strongly indicate that the school choice experiments should be allowed to continue, without the invidious sword of Blaine-Amendment inspired jurisprudence hanging over them.

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[4] *See* Paul E. Peterson, William G. Howell & Jay P. Greene, AN EVALUATION OF THE CLEVELAND VOUCHER PROGRAM AFTER TWO YEARS (Harvard Program on Education Policy and Governance, June 1999) (available at www.schoolchoiceinfo.org/research).

[5] *See, e.g.*, William G. Howell, Paul E. Peterson, Patrick J. Wolf & David E. Campbell, THE EDUCATION GAP: VOUCHERS AND URBAN SCHOOLS (Brookings Institution Press 2002) (reporting that African American students participating in voucher programs in New York, Dayton and Washington DC scored, on average, three percentile points higher than their public school peers in Year 1, six percentile points higher in Year 2, and seven percentile points higher in Year 3).

ARGUMENT

I. THE FIRST AMENDMENT AND EQUAL PROTECTION CLAUSES FORBID SINGLING OUT RELIGIOUS INSTRUCTION FROM AN OTHERWISE COMPREHENSIVE STATE FUNDING OF ALL OTHER PRIVATE ALTERNATIVES

When the states elect to provide public funding to private schools or students attending private schools as part of a comprehensive educational funding program, they cannot discriminate against religion by refusing to provide funds to students attending otherwise eligible private *religious* schools. The states cannot fence out religion in such circumstances by discriminatorily denying funding to students who choose to pursue private schooling at religious institutions.

However, Washington law clearly and impermissibly discriminates against religion by distinguishing between students taking *secular* theology classes at post-secondary institutions such as the University of Washington (who presumably are entitled to a state scholarship)[6] and students taking religiously motivated theology classes at otherwise eligible institutions such as Northwest College (who are not entitled to aid under state law).

"The Free Exercise Clause 'protects religious observers against unequal treatment.'" *Church of the Lukumi Babalu Aye, supra,* 508 U.S. at 542. Only generally applicable and neutral laws may (sometimes) burden the exercise of religion. *Id.* at 533-46. In *Lukumi*, for example, the Court invalidated ordinances dealing with the ritual slaughter of animals because, while the ordinances arguably were facially neutral,

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[6] *See* Br. for the Petitoners, p. 5 (Washington Constitution "does not prohibit the secular study of the topic of religion", citing *Calvary Bible Presbyterian Church of Seattle v. Board of Regents of the University of Washington*, 436 P.2d 189 (Wash. 1968)).

they were targeted to reach the religiously *motivated* practices of the Santeria adherents.

The Free Speech Clause likewise prohibits religious viewpoint discrimination. In *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), the Court unanimously held that a public school district could not discriminatorily refuse to make school facilities available for the showing of a religiously oriented film series, when those facilities were generally available to non-religious groups for non-religious purposes. The Court's holding was based squarely on the principle that the Free Speech Clause prohibits discrimination based on a particular point of view, *i.e.*, a religiously motivated point of view:

> "That all religions and all uses for religious purposes are treated alike under Rule 7, however, does not answer the critical question whether it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing *except those dealing with the subject matter from a religious standpoint . . . . Id* at 393-94 (emphasis added).

In *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), the Court applied the non-discrimination principle from *Lamb's Chapel* and held that the University of Virginia could not deny public funding to a religiously oriented student organization where the university was funding other, non-religious student groups. It was unconstitutional viewpoint discrimination to deny generally available funding to students who chose to use the funds for a religiously oriented activity. *Id.* at 834.

As in *Rosenberger*, Washington's comprehensive Promise Scholarship program involves a subsidy broadly available for course of instruction at eligible institutions of higher education. These grants are intended—*with the sole exception* of theology taught from a religious perspective—to be distributed by "comparatively objective decisions on

allocating public benefits . . . ." *National Endowment for Arts v. Finley*, 524 U.S. 569, 586 (1998) (citing *Rosenberger* and *Lamb's Chapel*). In short, by analogy to the "limited public forum" cases, the State has created a forum requiring evenhanded treatment of religiously motivated and non-religiously motivated students.

Washington neither has nor claims a cognizable expressive interest in the running of its Promise Scholarship program. Thus, decisions permitting the government to espouse a particular viewpoint when the state itself it is doing the speaking—*Rust v. Sullivan*, 500 U.S. 173 (1991), and *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540 (1983)—are inapplicable.

When the state has chosen to fund both public and private school education as part of a general program with neutral qualifying criteria, as the State of Washington has done with its scholarship program, the provision of a scholarship to a qualifying individual student cannot be characterized as a form of state speech. It is the individual student who chooses where and how to apply the money. The rule prohibiting viewpoint discrimination applies, as the Ninth Circuit correctly held.

Here, there is no valid state interest supporting the classification Washington has drawn. The State argues that it is enforcing its constitutional policy requiring a "higher wall" separating church and state than the one erected under the federal Establishment Clause. *See* Br. for the Petitioners, pp. 31-32. But that is not a valid state interest justifying discrimination against religion. If a particular law or practice has survived scrutiny under the federal Establishment Clause, a state's desire to further its purportedly more rigid anti-establishment constitutional vision is not a valid state interest justifying religious discrimination. In *Widmar v. Vincent*, 454 U.S. 263 (1981), the Court applied this principle—which is all the more pertinent after *Zelman*, *Lamb's Chapel* and

Rosenberger—to invalidate a state university policy that made facilities generally available for the activities of all student groups except for religious student groups seeking to use those facilities for religious worship and discussion. Writing for the Court, Justice Powell viewed the case as presenting an issue of the students' negative right to be free from religious discrimination: "The University has opened its facilities for use by student groups, and the question is whether it can now exclude groups because of the content of their speech." *Id.* at 273.

The Court specifically rejected the State of Missouri's argument that, even if the practice did not violate the federal Establishment Clause, Missouri had a compelling interest in complying with the "stricter separation of church and State" required by the Missouri constitution:

> "[T]he state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well. In this constitutional context, we are unable to recognize the State's interest as sufficiently 'compelling' to justify content-based discrimination against respondents' religious speech." *Id.* at 276.[7]

[7] Missouri is also a Blaine Amendment state. *See* Mo. Const. Art. IX, § 8 ("Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever").

In light of *Zelman*'s holding that Ohio's school voucher program does not violate the federal Establishment Clause, it is clear that public money constitutionally may reach private, religious schools as long as that is the result of a "true private choice" by students or their parents. States willing to fund private sector alternatives may not frustrate that ruling by claiming that their constitutions impose heightened restrictions (or even absolute prohibitions) on aid to students pursuing education at private, religious schools.[8]

II. THE EQUAL PROTECTION CLAUSE INVALIDATES STATE CONSTITUTIONAL PROVISIONS ROOTED IN HOSTILITY TOWARDS A PARTICULAR GROUP

For purposes of Equal Protection Clause analysis, hostility or animus towards a class of persons is *never* a valid state interest:

> "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Romer v. Evans*, 517 U.S. 620, 634-35 (1996) (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)).[9]

[8] Contrary to the dissent below, failure-to-fund cases like *Maher v. Roe*, 432 U.S. 464 (1980), are inapposite, because the exclusion here of theology majors taught from a religious perspective, is undergirded by no legitimate state interest, no legitimate "policy preference," *id.* at 470, other than separationist concerns no longer cognizable after *Zelman*. *See also* Pt. II, *infra*.

[9] As Justice O'Connor indicated in her concurring opinion in *Lawrence v. Texas*, __ U.S. ___, 123 S. Ct. 2472, 2484-85 (2003), *Romer* is not an island of analysis unto itself. Rather, it is part of a line of cases invalidating laws that are based on the hostility of the majority to a distinctly disfavored group. *See, e.g., Moreno*, 413 U.S. at 535 (invalidating a law "intended to prevent so-called 'hippies' and 'hippie

The constitutionally required separation between church and state does not permit hostility towards religion. And despite the State's effort to put distance between this case and its Blaine-Amendment inspired jurisprudential provenance, Br. for the Petitioners, p. 1 n. 1, the legislative prohibition that denies Davey his Promise Scholarship is indeed rooted in this troubling history.

For a good part of the nineteenth century, the country's public schools were "propagators of a generic Protestantism that . . . 'was intolerant of those who were non-believers.'"[10] The Protestant King James Bible was a part of the public schools' core curriculum. As Steven K. Green, author of a so-called historians' brief on behalf of Petitioners in this case, has acknowledged in his scholarly writings: "In all levels of education, both public and private, primary through collegiate, the moral teachings of the Bible were taught and, to varying degrees, religious services were conducted . . . . Schools were the primary promulgators of this Protestant way of life."[11]

A week after a 1875 speech by then President Grant attacking government support for "sectarian schools" and calling for public education "unmixed with sectarian, pagan or atheistical dogmas," Congressman Blaine proposed a consti-

communes' from participating in the food stamp program"); *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (invalidating a Texas statute that denied public funding to any local school district that permitted the enrollment in its schools of children of illegal aliens); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 450 (1985) (invalidating a local zoning ordinance prohibiting a group home for the mentally retarded because "[t]he short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded . . . .").

[10] *See* DeForrest, *supra* note 2, at 559 (citation omitted).

[11] Steven K. Green, THE BLAINE AMENDMENT RECONSIDERED, 36 Am. J. Legal Hist. 38, 45 (1992).

tutional amendment to implement these ideas.[12] Although carefully written to appear uniform in removing all religion from the public schools, its purpose was unambiguous: to ban all public aid to private non-Protestant (primarily Catholic) schools.[13] In its final Senate form, Blaine's proposed amendment read as follows:

> "No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no religious test shall be required as a qualification to any office or public trust under any State. No public property and no public revenue, nor any loan of credit by or under the authority of the United States, or any State, Territory, District, or municipal corporation, shall be appropriated to or made or used for the support of any school, educational or other institution under the control of any religious or anti-religious sect, organization, or denomination, *or wherein the particular creeds or tenets shall be taught*. And *no such particular creed or tenets shall be read or taught* in any school or institution supported in whole or in part by such revenue or loan of credit; and no such appropriation or loan of credit shall be made to any religious or anti-religious sect, organization, or denomination or to promote its interests or tenets. *This article shall not be construed to prohibit the reading of the Bible in any school or institution*, and it shall not have the effect to impair the rights of property already vested."[14]

Blaine's proposed amendment passed the House in 1876 by a vote of 180 to 7, but in the Senate it fell 2 votes short of the

[12] DeForrest, *supra* note 2, at 565-66.

[13] *See* Joseph P. Viteritti, BLAINE'S WAKE: SCHOOL CHOICE, THE FIRST AMENDMENT, AND STATE CONSTITUTIONAL LAW, 21 Harv. J.L. & Pub. Pol'y 657, 670-72 (1998) (hereafter "Viteritti"); DeForrest, *supra* note 2, at 568-69.

[14] Quoted in DeForrest, *supra* note 2, at 568 (emphasis added).

two-thirds majority required for passage and submission to the states.[15]

Although they did not become a part of the federal Constitution, "Blaine Amendments"—versions of the federal constitutional proposal—eventually found their way into approximately 30 state constitutions. Some states voluntarily adopted Blaine Amendments almost immediately after the failure of the proposed national amendment; some states voluntarily adopted them in later years; and still other states had Blaine Amendments imposed on them by the federal government as a condition of admittance to the Union.[16]

Blaine Amendments were imposed on the State of Washington (and on North Dakota, South Dakota and Montana) by the federal Enabling Act of 1889. Enabling Act, ch. 180, 25 Stat. 676-77 (1889).[17] The Enabling Act authorized the Washington constitutional convention but prescribed certain conditions on the admittance of Washington to the Union, including adoption of state constitutional Blaine Amendments. Section 4 of the Enabling Act compelled Washington (among other things) to establish public schools free from "sectarian" influence:

> "Fourth. Provision shall be made for the establishment and maintenance of systems of public schools free from *sectarian control* which shall be open to all the children of the said state." *Ibid.* (emphasis added).

"While the wording of the Enabling Act, like the wording of the original Blaine Amendment itself, appears neutral, those

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[15] DeForrest, *supra* note 2, at 573; Robert F. Utter & Edward Larson, CHURCH AND STATE ON THE FRONTIER: THE HISTORY OF THE ESTABLISHMENT CLAUSES IN THE WASHINGTON STATE CONSTITUTION, 15 Hastings Const. L.Q. 451, 462-64 (1988) (hereafter "Utter & Larson").

[16] DeForrest, *supra* note 2, at 573.

[17] For the complicated political history of the Enabling Act of 1889, *see generally* Utter & Larson, *supra* note 15, at 458-61.

words were intended to reinforce the generic Protestantism of the common schools."[18] As this Court previously observed, "it was an open secret that 'sectarian' was code for 'Catholic.'" *Mitchell, supra*, 530 U.S. at 828.

Of course, Washington complied with the federal mandate. The provisions of Section 4 of the Enabling Act itself are contained in Article XXVI of the Washington constitution, captioned "Compact with the United States."[19] Article IX, Section 4 of the Washington constitution prohibits "sectarian control or influence" over the state's schools:

> "Sectarian control or influence prohibited. All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence."[20]

The Washington supreme court recently has held that this section applies only to primary and secondary schools. *See State ex rel Gallwey v. Grimm*, 48 P.3d 274, 279-84 (Wash. 2002) ("Based on the abundance of structural and historical evidence available, we hold that article IX, section 4 was not intended to apply to institutions of higher education."). Constitutional restrictions on public support for post-secondary private religious schools are contained in Article I, Section 11 of Washington's constitution, which provides:

> "Religious freedom. Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of

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[18] DeForrest, *supra* note 2, at 574.

[19] *See* Robert F. Utter and Hugh D. Spitzer, THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE (Greenwood Press 2002) (hereafter "Utter & Spitzer, THE WASHINGTON STATE CONSTITUTION").

[20] Quoted in *id.* at 159.

> licentiousness or justify practices inconsistent with the peace and safety of the state. *No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment . . . .*" [21]

The two provisions cannot, however, be easily separated. Article I, Section 11 "is usually interpreted in tandem with Article IX, Section 4, which specifically requires that schools supported wholly or in part by public funds be free from sectarian control or influence." [22] The "sole purpose" of the italicized section of Article I, Section 11 was to prohibit the expenditure of public funds for "sectarian" religious instruction:

> "Consideration of these various historical sources demonstrates that the sole purpose of the 'religious instruction' clause of Const. art. 1, § 11 was to prevent public schools from giving sectarian religious instruction and to prevent the use of public funds to support private parochial schools."

See Witters v. State of Washington Commission for the Blind, 771 P.2d 1119, 1130 (Wash. 1989) (Utter, J., dissenting, joined by Dolliver and Dore, JJ).

Blaine Amendments reflect a form of raw religious animus dressed up as principled separateness between church and state. The governmental animus behind their enactment places in constitutional doubt their legal progeny.

In many respects, this case resembles *Romer v. Evans*, *supra*. In *Romer*, at issue was a state constitutional provision that discriminated against homosexuals. Here, it is a state constitutional provision that discriminates against religious believers (or those simply religiously curious) seeking education. In both situations, the state has written a provision

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[21] Quoted in *id.* at 25 (emphasis added).

[22] *Id.* at 26.

(or provisions) into its organic law that intentionally delegitimizes a class of its citizenry. Homosexuals in Colorado were prohibited by Amendment 2 from seeking legislative protection from discrimination; those seeking education under religious auspices are prohibited, by legislation stemming from Blaine-Amendment jurisprudence, from obtaining funding that is made available by the state to all other students attending both public and private schools. "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Romer*, *supra*, 517 U.S. at 633.[23]

III. BLAINE AMENDMENT-INSPIRED LAWS SHOULD NOT BE PERMITTED TO CUT SHORT THE SCHOOL CHOICE EXPERIMENT

Approximately 85 % of the country's private schools have some religious affiliation.[24] In the Cleveland program upheld

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[23] Lower federal courts have cited *Romer* for the proposition that discrimination against students seeking generally available state aid to attend private religious schools violates the Equal Protection Clause. *E.g.*, *Peter v. Wedl*, 155 F.3d 992, 996 (8th Cir. 1998) (citations omitted) ("While children who attended private nonreligious schools could receive government-funded special education services directly at their private schools, students like [plaintiff] could not. Government discrimination based on religion violates the Free Exercise Clause of the First Amendment, the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment."). *See also Columbia Union College v. Clarke*, 527 U.S. 1013 (1999) (Thomas, J., dissenting from the denial of certiorari) ("Columbia's exclusion from the [state aid program] 'raises the inevitable inference that the disadvantage imposed is born of animosity to the class of [institutions] affected'" (quoting *Romer v. Evans*, 517 U.S. 620, 634 (1996)).

[24] DeForrest, *supra* note 2, at 554; *see also Zelman, supra*, 536 U.S. at 656-57 ("But Cleveland's preponderance of religiously affiliated private schools certainly did not arise as a result of the program; it is a phenomenon common to many American cities").

in *Zelman*, approximately 82 % of the private schools participating in the program at that time were religiously affiliated private schools, and 96 % of the students receiving a voucher in that program applied it towards an education at a private religious school. *Zelman, supra*, 536 U.S. at 647, 658. Approximately 30 states have Blaine Amendments in their constitutions.[25] Thus, if religious schools are excluded from school choice programs by operation of these discriminatory laws, "the school voucher movement will be effectively dead as a serious option in reforming education." [26]

The school voucher experiment, stymied for years by legal uncertainty,[27] is beginning to influence the future of educational opportunity in this country, and should not be nipped in the bud in this way. The available information suggests there are many benefits to school choice programs, particularly for African-American students, that are only now beginning to be realized.

First, the data indicate that African-American students participating in voucher programs achieve higher levels of academic achievement than their non-participating peers. A study of a privately funded school voucher program operating in Washington D.C. reported statistically significant gains for participating African-American students in both reading and math achievement test scores.[28] Another study conducted

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[25] DeForrest, *supra* note 2, at 554.

[26] *Ibid.*

[27] *Zelman, supra*, 536 U.S. at 660, n. 5.

[28] *See* Patrick J. Wolf, Paul E. Peterson, & Martin R. West, RESULTS OF A SCHOOL VOUCHER EXPERIMENT: THE CASE OF WASHINGTON, D.C. AFTER TWO YEARS (August 2001) (available at www.ksg.harvard.edu/pepg/pdf/PEPG01-05%20Exec%20Sum.pdf) ("Overall, the effect of the voucher intervention on the combined reading and math achievement of the African American students was 9 National Percentile Rank (NPR) points. The gain of these students relative to the control group was nearly 10 NPR points in math and 8 NPR points in reading, effects that are each

jointly by Harvard University, Mathematica Policy Research, Inc. and the University of Wisconsin regarding the privately funded voucher program in New York City reported similar results.[29] In New York, African-American students who used a voucher to go to a school of choice for three years had a composite National Percentile Rank (NPR) of 26.83 on their follow-up tests, compared with a control group of African-American students who had an NPR composite score of 17.60—a 9.23 percentile point difference. The scores of all African-American students who had attended a school of choice on a voucher for at least one year had a composite NPR of 25.37, compared with a composite score of 17.82 for the control group—a difference of 7.55 percentile points after only one year in the voucher program.[30] According to a recently published study reporting combined results from research on the New York, Dayton, Ohio and Washington D.C. voucher programs, "African American students participating in voucher programs scored, on average, three

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statistically significant and are not significantly different from each other. The test score effects for the younger cohort of students were indistinguishable from the effects for the older cohort").

[29] *See* Daniel P. Mayer, Paul E. Peterson, David E. Myers, Christina Clark Tuttle & William G. Howell, SCHOOL CHOICE IN NEW YORK CITY AFTER THREE YEARS: AN EVALUATION OF THE SCHOOL CHOICE SCHOLARSHIPS PROGRAM FINAL REPORT (Mathematica Policy Research, Inc., Report No. 8404-045, February 19, 2002) ("Executive Summary" available at http://www.ksg.harvard.edu/pepg/pdf/nyc %20yr3%20MPR-PEPG%20exec.summ%202.19.02.pdf). This study also found no statistically significant impact of the voucher program on achievement levels for Latino students but, significantly, it did not find any detrimental impact on those students.

[30] The results are even more dramatic for math achievement, where African-American voucher students who stayed in a school of choice for three years scored a full 11.80 percentile points higher on the math test than did the control group, and voucher students who had attended a private or parochial school for at least one year scored 9.65 percentile points higher in math. *Ibid.*

percentile points higher than their public school peers in Year I, six percentile points higher in Year II, and seven points higher in Year III. Aggregated test score differences after two and three years were statistically significant. In no city or year did the scores of non-African American students in public and private schools differ significantly from one another." [31]

Second, studies indicate that the enhanced competition spurred by voucher programs is driving the public schools to improve their performance. This is one of the goals of school choice programs. (A majority of the students in this country will continue to be educated in the public schools, regardless of the popularity of school choice programs.) One study analyzed the performance of public schools faced with competition from voucher programs in Milwaukee, Wisconsin and San Antonio, Texas.[32] It found that public schools in San Antonio "did as well or better than 85% of Texas school districts, after controlling for population demographics and local resources." [33] In Milwaukee, the study found that private-school competition (at the fourth grade level) and charter-school competition (at the tenth grade level) caused significant improvements in public school test scores after controlling for other factors.[34] A recently published working paper regarding Florida's voucher program reports that "Florida's low-performing schools are improving in direct proportion to the challenge they face from

[31] William G. Howell, Paul E. Peterson, Patrick J. Wolf & David E. Campbell, THE EDUCATION GAP: VOUCHERS AND URBAN SCHOOLS (Brookings Institution Press 2002), at 140-167.

[32] *See* Jay P. Greene & Greg Forster, RISING TO THE CHALLENGE: THE EFFECT OF SCHOOL CHOICE ON PUBLIC SCHOOLS IN MILWAUKEE AND SAN ANTONIO (Manhattan Institute October 27, 2002) (available at www.manhattan-institute.org/html/cb_27.htm).

[33] *Id.* at 8.

[34] *Ibid.*

voucher competition. These improvements are real, not the result of test gaming, demographic shifts, or the statistical phenomenon of 'regression to the mean.'" [35]

Third, studies show that "school choice helps promote integration" in the schools.[36] On average, private schools typically are better racially integrated than the public schools because private schools draw students from across political and neighborhood boundaries, allowing them to transcend segregated housing.[37] In Cleveland, "nearly a fifth (19.0%) of choice students attend private schools that have a racial composition that is within 10% of the average racial composition in the Cleveland area. This is considerably better than the 5.2% of Cleveland metro area public school students, the 10.2% of Cleveland City public school students, or the 3.3% of Cleveland suburban public school students who attend schools that are similarly racially mixed." [38] A

[35] Jay P. Greene & Marcus A. Winters, WHEN SCHOOLS COMPETE: THE EFFECTS OF VOUCHERS ON FLORIDA PUBLIC SCHOOL ACHIEVEMENT (Manhattan Institute, August 2, 2003), at p. 2 (available at www.manhattan-institute.org/html/ewp_02.htm#01). ("Schools already facing competition from vouchers showed the greatest improvements of all five categories of low-performing schools, improving by 9.3 scale score points on the FCAT math test, 10.1 points on the FCAT reading test, and 5.1 percentile points on the Stanford-9 math test relative to Florida public schools that were not in any low-performing category . . . Schools threatened with the prospect of vouchers showed the second greatest improvements, making relative gains of 6.7 scale points on the FCAT math test, 8.2 points on the FCAT reading test, and 3.0 percentile points on the Stanford-9 math test").

[36] Jay P. Greene, THE RACIAL, ECONOMIC, AND RELIGIOUS CONTEXT OF PARENTAL CHOICE IN CLEVELAND (October 8, 1999), at 13 (available at www.schoolchoiceinfo.org/data/research/Clevint.pdf) ("Private schools, and perhaps particularly religious private schools, appear able to transcend resistance to integration in housing to provide schools that are racially, economically, and religiously integrated").

[37] *Id.*, at 5.

[38] *Id.* at 8.

study conducted in Milwaukee found that religiously affiliated private schools there were the *most* racially integrated as between public, private nonreligious and private religious schools.[39] Thus, school choice programs also further compelling constitutional values. *See Grutter v. Bollinger* __ U.S. __, 123 S. Ct. 2325, 2340 (2003); *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

Other socially desirable consequences flowing from school choice programs include enhanced parental satisfaction[40] and a decreasing incidence of disciplinary problems such as fighting and cheating.[41] There is evidence that attendance at private school on a voucher increases the self-confidence of

[39] Howard L. Fuller & Deborah Greiveldinger, THE IMPACT OF SCHOOL CHOICE ON RACIAL INTEGRATION IN MILWAUKEE PRIVATE SCHOOLS (American Education Reform Council, August 2002), at 6 (available at www.schoolchoiceinfo.org/data/research/integ0802.pdf).

[40] *See* Jay P. Greene, A SURVEY OF RESULTS FROM VOUCHER EXPERIMENTS: WHERE WE ARE AND WHAT WE KNOW 4-5, Civic Report, No. 11 (July 2000) (available at www.schoolchoiceinfor.org/research) ("after two years of the program choice parents were significantly more satisfied with almost all aspects of their children's education than were the parents of a random sample of Cleveland public school parents. Nearly 50 percent of choice parents reported being very satisfied with the academic program, safety, discipline, and teaching of moral values in the private school," compared to only 30 percent of Cleveland public school parents who reported similar levels of satisfaction).

[41] *See* Paul E. Peterson & David E. Campbell, AN EVALUATION OF THE CHILDREN'S SCHOLARSHIP FUND (May 2001), at 19 (available at www.schoolchoiceinfo.org/research) (reporting that the Children's Scholarship Fund found that far fewer private school parents than public school parents rated the following problems as serious at their children's schools: fighting; cheating; stealing; gangs; racial conflict; and guns).

the student.[42] There also is some evidence that vouchers facilitate racial comity.[43]

African-American children stuck in failing public schools are entitled to the opportunities and benefits potentially available through these school choice programs. By practical necessity, many of the achievements reported in these studies were attained in private religious schools. Blaine Amendments and Blaine-influenced legislation should not be allowed to eviscerate programs that hold such promise for so many historically disadvantaged low-income and minority children.

[42] William G. Howell, Paul E. Peterson, Patrick J. Wolf & David E. Campbell, THE EDUCATION GAP: VOUCHERS AND URBAN SCHOOLS (Brookings Institution Press 2002), at 123-125 ("After two years in Dayton, for example, private school students were significantly more likely than the control group to say 'I feel good about myself,' and in Washington, private school students were more likely to say that they were 'able to do things as well as most other people'").

[43] *Id.* at 128-130 ("On average, private school parents in New York City, Dayton, and Washington were less likely than their public school counterparts to report that racial conflict was a serious problem in their child's school").

CONCLUSION

The judgment of the Court of Appeals should be affirmed. The Court should hold that discrimination against religious education in the distribution of state aid that is extended broadly for use in the private sector, is forbidden under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. When a state elects to fund students attending private schools, it cannot refuse to extend the same assistance to otherwise eligible students who choose to pursue a religiously oriented course of study at otherwise eligible institutions.

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Supreme Court of the United States

GARY LOCKE, GOVERNOR OF WASHINGTON, *et al.*,
Petitioners,

v.

JOSHUA DAVEY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*[1]

The National Jewish Commission on Law and Public Affairs ("COLPA") is an organization of volunteer lawyers

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[1] No person, organization or corporation other than the *amicus* and the organizations named herein have assisted in or contributed to the preparation of this brief. The parties have consented to the filing of this brief.

that advocates the position of the Orthodox Jewish community on legal issues affecting religious rights and liberties in the United States. COLPA has consistently supported the principle of fair and even-handed treatment for students who attend Jewish and other religious schools. Over the past 35 years, since *Board of Education* v. *Allen*, 392 U.S. 236 (1968), COLPA has filed *amicus* briefs in nearly all cases considered by this Court involving government assistance to students attending religious educational institutions and in many other cases involving the constitutional provisions regarding freedom of religion.[2]

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[2] *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Good News Club v. Milford Cent. School*, 533 U.S. 98 (2001); *Mitchell v. Helms*, 530 U.S. 793 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Agostini v. Felton*, 521 U.S. 203 (1997); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Lee v. Weisman*, 505 U.S. 577 (1992); *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987); *Local No. 93, Intern. Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501 (1986); *Ohio Civil Rights Com'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986); *School Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Aguilar v. Felton*, 473 U.S. 402 (1985); *Mueller v. Allen*, 463 U.S. 388 (1983); *Bob Jones University v. United States*, 461 U.S. 574 (1983); *Widmar v. Vincent*, 454 U.S. 263 (1981); *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979); *Regents of University of California v. Bakke*, 438 U.S. 265 (1978); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977); *Committee for Public Ed. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Dewey v. Reynolds Metals Co.*, 402 U.S 689 (1971); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Walz v. Tax Commission of City of New York*, 397 U.S. 664 (1970); *Board of Ed. of Central School Dist. No. 1 v. Allen*, 392 U.S. 236 (1968).

COLPA submits this *amicus* brief on behalf of, and is joined by, the following seven national Orthodox Jewish organizations:

- Agudas Harabonim of the United States and Canada is the oldest Orthodox rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Jewish community.

- Agudath Israel of America is the nation's largest grassroots Orthodox Jewish organization, with chapters in 36 states and over 50 cities throughout the United States. One of its functions is to serve as an advocate for the cause of Jewish schools and Jewish education.

- National Council of Young Israel is a coordinating body for more than 300 Orthodox synagogue branches in the United States and Israel. It is involved in matters of social and legal significance to the Orthodox Jewish community.

- The Rabbinical Alliance of America is an Orthodox Jewish rabbinical organization with more than 400 members. It has for many years been involved in a variety of religious, social and educational areas affecting Orthodox Jews.

• The Rabbinical Council of America is the largest Orthodox Jewish rabbinical organization in the world. Its membership exceeds one thousand rabbis, and it is deeply concerned with issues related to religious freedom.

• Torah Umesorah-The National Society for Hebrew Day Schools is the coordinating body for more than 600 Jewish day schools across the United States and Canada.

• The Union of Orthodox Jewish Congregations of America (the "U.O.J.C.A.") is the largest Orthodox Jewish synagogue organization in North America, representing nearly one thousand congregations. Through its Institute for Public Affairs, the U.O.J.C.A. represents the interests of its national constituency on public policy issues.

Each of these organizations subscribes to the view that American society is best served when religion is allowed to flourish, and that attempts to maintain an impregnable "wall of separation" between church and state — such as is embodied in State "Blaine Amendments" — results in government hostility to religion and discrimination against people of faith.

As observant Jews, we know all too well the dangers and the consequences of government-sanctioned hostility to religious practices. We are particularly concerned when that hostility is directed, as in the case now before this Court, at religious learning and study. For Orthodox Jews, intensive daily study of the Torah, the Talmud, the Code of Jewish Law, and other works that expound on these basic texts is an essential component of our religious observance. The centrality of Torah study is emphasized repeatedly in the Jewish religious tradition. Thousands of students pursue

Jewish religious tradition. Thousands of students pursue advanced religious Torah studies in post-secondary institutions of higher Jewish learning while receiving college-level educations that equip them for contemporary life as professionals or other wage-earners in modern society.

Students enrolled in such institutions should not be disadvantaged in comparison with their peers enrolled in non-sectarian schools. Yet State "Blaine Amendments," which originally passed during a wave of anti-Catholic xenophobia, may be used today to block government assistance to college students who also attend religious educational institutions.

We acknowledge that the Establishment Clause imposes limits on direct government financial aid to religious schools. But the Blaine Amendments go further if they are interpreted to deny aid to students who are studying secular subjects merely because, at the same time, they intensively study religion from a religious perspective at religious institutions. In the case before the Court, for example, Washington State entitles qualified students pursuing all forms of study to receive Promise Scholarships. Only students who take their religion seriously enough to devote a significant portion of their college education to the pursuit of religious study in a religious setting are disqualified.

Disqualifying students seeking to pursue religious studies – no matter what else they may be studying simultaneously – constitutes a degree of hostility to religion that is unconstitutional under authoritative rulings of this Court. The Court should affirm the decision below and invalidate discrimination against religious observance and religious study of the kind demonstrated by Washington's statute and practice.

ARGUMENT

INTRODUCTION

This case concerns the constitutionality, under the Free Exercise Clause, of a state law that prohibits a State from providing financial assistance to an otherwise qualified college student because that student "is pursuing a degree in theology." Wash. Rev. Code § 28B.10.814. The Washington State authorities have interpreted this statute to apply only to students who study theology "from a religious perspective."

This disqualification is unconstitutional because it is "restrictive of religious practice" and discriminates against conduct "because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520, 532, 546 (1993). A college student who takes his religious beliefs seriously enough that he pursues "a degree in theology" at a school that is accredited by the State suffers discrimination on account of his religious observance if the State refuses to provide to him the same financial assistance that it provides to other objectively qualified students who pursue a degree in history, languages, sciences, or mathematics.

The discrimination is particularly severe as it applies to religiously observant Jewish college students. Our religious beliefs command us to study religious teachings – *i.e.,* to pursue the study of theology "from a religious perspective" – in addition to whatever secular studies we may pursue in order to earn a livelihood. If the challenged Washington statute is taken literally, Jewish college students who spend a significant portion of their average day studying the Talmud and Jewish Codes – as they are obligated to do by their religious convictions – become ineligible, on account of this dedication to religious observance, for the

governmental scholarship assistance that is provided to contemporaries who are no more qualified, but who lack equal dedication to religious practice. The existence of this rule also inhibits Jewish college students who believe that their religious obligations include intensive study of the Torah, the Talmud, and the Codes of Jewish Law. If intense religious study results in ineligibility for a state-funded scholarship grant, students will be deterred from engaging in study required by religious convictions.

The effect of the Washington State statute that disqualifies any student who is "pursuing a degree in theology" from receiving a Promise Scholarship is equivalent, in a constitutional sense, to a disqualification of any student who wears a yarmulke, or any student who eats only food prescribed by religious dietary laws, or any student who observes Saturdays as the Sabbath. It removes a student who is otherwise fully qualified and eligible for personal financial assistance from the roster of eligible students exclusively because he or she takes his or her religion seriously. That form of discrimination violates the Free Exercise Clause of the United States Constitution and cannot be justified by a purported policy of Washington State to erect a higher "Wall of Separation" between Church and State than is provided by the Establishment Clause.

I

THE WASHINGTON STATUTE IS A DISQUALIFICATION LAW, NOT A LIMITATION ON EXPENDITURE OF STATE FUNDS

Notwithstanding assertions repeatedly made in the Petitioners' Brief and in the briefs of *amici* supporting the petitioners, the statute at issue in this case is not truly a

limitation on the disbursement of state funds for religious instruction. Section 28B.10.814 of the Washington Revised Code is not cast as a prohibition against expending funds for a defined purpose. It disallows state aid "to any student" pursuing the defined course of study. Washington State's Promise Scholarship does not pay any teacher, whether he be a teacher of religion or any other subject. Nor does it purchase any book or instructional aid.

The Promise Scholarship is an annual grant to graduates of Washington high schools who have outstanding academic records, who have achieved high scores on standardized objective pre-college examinations, and whose families have economic need for financial assistance during their dependents' college years. It is a grant made *to a student*, not a purchase of services or goods.

Students who qualify under objective criteria and choose to attend public or nationally accredited colleges located in the State of Washington receive, through their colleges, one or two *personal* annual state-funded payments of $1125 to $1542 that the eligible students may use as they see fit. The funds may be used for a student's room or board, for transportation, or for any other academically related purpose. A student may also, if he or she chooses, apply the funds to tuition, but the choice is entirely up to the student.

Washington State law prescribes only two additional qualifications: (1) The student must be enrolled in college at least half-time. (2) The student may not be "pursuing a degree in theology."

At issue in this case is the second of these statutory criteria. In the context of the Promise Scholarship Program, it is plain that the "pursuing a degree in theology" provision

is simply a disqualification of certain otherwise qualified students such as the respondent in this case.

It makes no difference under the "theology" disqualification how many classes other than theology classes are being taken by the qualified student. Nor does it make any difference if the otherwise qualified student is "pursuing" degrees in other subjects in addition to theology – as the respondent in this case was actually doing. And the State of Washington does not care how the student chooses to spend the grant given him or her by the State. The student becomes ineligible for the grant simply because he or she is "pursuing a degree in theology."

II

THE INTENSIVE STUDY OF RELIGIOUS TEXTS FROM A RELIGIOUS PERSPECTIVE IS A CENTRAL TENET OF JEWISH RELIGIOUS OBSERVANCE

By disqualifying a college student from a state-financed benefit because he "is pursuing a degree in theology" from a religious perspective, the State of Washington effectively discriminates against Jewish college students who, as part of their religious observance, must study religious texts intensively. By religious tradition, such concentrated study should ideally result in the student's achievement of a level of expertise that would be the equivalent of what is required to qualify as a teacher and rabbi. Jewish college students who take their religious duties seriously often combine sustained Torah study which culminates with rabbinic ordination or its equivalent with a secular college program. If the religious education renders

them ineligible for a state-financed personal scholarship program during their college years, these students are being singled out for discriminatory treatment merely because of their religious observance.

The *Encyclopedia Judaica* begins its description of the Jewish religious duty to study religious texts from a religious perspective: "The study of the Torah (*talmud Torah*) as a supreme religious duty is one of the most typical and far-reaching ideas of rabbinic Judaism. Talmudic literature is full of references to the *mitzvah* [commandment] of Torah study, especially of the difficult halakhic portions which require the fullest application." 15 *Encyclopedia Judaica*, "Study" 453 (1971). The historical aspect of this religious duty is described as follows: "The ideal of Torah study as a lifelong pursuit incumbent upon all Jews found ample concretization in the course of Jewish history." *Id.* at 458. "Dedicated students, 'toiling in the Torah,' were found to number in the thousands in the great Palestinian and Babylonian academies during the first five centuries of the present era." *Id.* at 453.

Maimonides, the great twelfth century Codifier of Jewish Law, summarized the religious obligation as follows in Chapter 1 of "The Laws Concerning the Study of the Torah" in his classic work *Mishneh Torah,* Book One:

> (8) Every Israelite is under an obligation to study Torah, whether he is poor or rich, in sound health or ailing, in the vigor of youth or very old and feeble. Even a man so poor that he is maintained by charity or goes begging from door to door, as also a man with a wife and children to support, is under the obligation to set aside a definite period during the day and at night for the study of the Torah, as it is said, "But you shall meditate therein day and night" (Joshua 1:8).

* * * * *

> (10) Until what period in life ought one to study Torah? Until the day of one's death, as it is said, "And lest they [the precepts] depart from your heart all the days of your life" (Deuteronomy 4:9). Whenever one ceases to study, one forgets.

Rabbi Joseph Caro, in his sixteenth century monumental codification of Jewish Law called the *Shulchan Aruch,* ruled that every Jewish male is obligated to study the Torah every day of his life. *Yoreh Deah* 246:1. Contemporary scholars have emphasized this religious obligation of the observant Jew in the modern world. For example, Dr. Norman Lamm, Chancellor and recently retired President of Yeshiva University, said:

> The study of Torah has always been accorded high significance in Judaism. The clearest formulation of this principle is given in the Mishnah: The study of Torah is equal to all the other precepts. Even more than merely "an integral part of Jewish piety," *talmud Torah* was considered an act performed by God Himself: "The Holy One, blessed be He, the King of Kings of Kings . . . one-third of the day He studies Bible and Mishnah.". . . . [T]he virtue of the study of Torah, as such, is incontestable. All of Judaism is dedicated to the importance and practice of *talmud Torah.* It raises man to the level of a priest. . . . . The reward of the righteous in the world-to-come will be further study of Torah. The study of

> Torah enhances brotherliness and is a source of consolation to those on the brink of despair. "What joy can a man find in the world? Solely in the words of the Torah." All of the *baraita Kinyan Torah*, appended to Mishnah *Avot* as the sixth chapter, is a paean of praise for the study of Torah.

Norman Lamm, Torah Lishmah: Torah for Torah's Sake (Ktav 1989), p. 102 (footnotes omitted).

A recent work by an internationally renowned Israeli rabbinic figure (who also received a Doctorate in English Literature from Harvard University) explained the modern Jew's religious duty to study religious texts intensively from a religious perspective as follows:

> *[T]almud Torah* is not merely a preliminary to observance. It is itself a *mitzvah* – indeed, one of the most basic. Torah study, ideally conceived as both an intellectual exercise and a religious experience, is imposed by the Halakhah as a universal daily obligation. Insisting that God must be served with the head as well as with the hands and the heart, [Judaism] sees intellection as an integral aspect of the religious life of every individual. It has never seen religious study as the private preserve of an ecclesiastical hierarchy or of a privileged intellectual elite. On the contrary, it posits *talmud Torah* as the duty and destiny of all. It realizes that great success in the exercise of reason as part of man's search for God cannot come to all, or even to many, but it considers this no reason for abandoning the attempt. It is precisely for the effort, the

> *process* of the *recherche*, that the Halakhah presses most insistently. Of *yedi'at Ha-Torah*, the knowledge of Torah, [rabbinic consensus] has relatively little to say; but of *talmud Torah*, they can never say enough.

Aharon Lichtenstein, Leaves of Faith: The World of Jewish Learning (Ktav 2003), pp. 90-91.

This religious obligation is not the province of rabbis and academicians alone; it is the duty of every Jew. Rabbi Meir, a leading figure of the first century Tannaitic period, is quoted in *The Ethics of the Fathers* 4:12: "Rabbi Meir said: 'Reduce your business activities and engage in Torah study. . . . If you neglect the study of Torah, you will have many excuses to neglect it. But if you labor in the Torah, you will be given much reward.'" And Rabbi Judah ben Ilai is quoted in the Talmud (*Berachot* 35b) as contrasting "earlier generations" which made the study of Torah their main concern and their livelihoods secondary with "later generations" which gave primary importance to secular concerns and secondary status to Torah study. The former, he said, prospered in both fields, whereas the latter succeeded in neither.

The result of these teachings is that many Jewish college students throughout the United States combine their secular college educations with intensive study of religious texts from a religious perspective. M. Herbert Danzger, Returning to Tradition: The Contemporary Revival of Orthodox Judaism (Yale University Press 1989), pp. 149-151, 278. Indeed, the principal author of this brief – who has argued 27 cases in this Court and written many *amicus* briefs in cases heard by the Court – received an undergraduate college education while studying six hours a day in the rabbinic school of Yeshiva University. During his college

years (1953-1957), undersigned counsel was the beneficiary of a New York State Regents Scholarship, which assisted substantially in financing counsel's undergraduate secular education. That scholarship was awarded on the basis of performance in an objective examination administered statewide. Had New York State law barred anyone pursuing a "degree in theology" from a religious perspective from receiving a New York State Regents Scholarship, the author of this brief would probably have been disqualified from receiving such a Regents Scholarship for his secular studies and might never have qualified for an undergraduate degree, proceeded to the Harvard Law School, obtained a clerkship with a Justice of this Court, and served as an Assistant to Solicitors General Archibald Cox and Thurgood Marshall. What the future holds in store for the respondent in this case is not yet known,[3] but disqualification from a financial benefit that the State of Washington is prepared to give him based on objective academic performance should not result from his conscientious adherence to religious convictions.

III

THE DISQUALIFICATION OF STUDENTS STUDYING THEOLOGY FROM A RELIGIOUS PERSPECTIVE IS NOT NEUTRAL AND IT SUPPRESSES RELIGIOUS OBSERVANCE

The challenged Washington statute fails the "neutrality inquiry" and the "general applicability" test of *Church of the Lukumi Babalu Aye v. City of Hialeah,* 508

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[3] A recent article discussing this case reports that the respondent has "decided to attend Harvard Law School upon graduating from Northwest." Ryan, "The Neutrality Principle," 3 Education Next, No. 4, p. 29 (Fall 2003).

U.S. 520, 542 (1993), in at least two major respects. *First,* it disqualifies college students who are pursuing a degree in theology, as contrasted with students who are pursuing degrees in philosophy, history, mathematics, or psychology. Since the Promise Scholarship does not pay directly for a student's academic courses but may be used by the student for any academic purpose whatever, there is no legitimate policy justification for singling out "theology," as opposed to "philosophy" or "psychology," as a forbidden degree major. Students who are majoring in theology should be no less entitled to receive personal grants to be used for room, board, or transportation than students who are studying languages or literature. By singling out and disqualifying students who are pursuing degrees in theology, the Washington statute manifests a constitutionally impermissible hostility to religion.

Second, the exception for theology majors studying that subject "from a religious perspective" makes the challenged Washington law "selective" rather than a law "of general applicability." By declaring ineligible anyone who studies theology from a religious perspective, the law "imposes burdens only on conduct motivated by religious belief." 508 U.S. at 543. Whether theology is taught from a "secular" perspective or from a "religious" perspective would make no difference if the law were truly a statute of "general applicability." Disqualifying students because of the "religious perspective" of the instruction is a means of deterring "conduct motivated by religious belief." That is precisely what this Court's *Lukumi Babalu Aye* decision condemns. 508 U.S. at 545. It is also prohibited by this Court's earlier decision in *McDaniel v. Paty,* 435 U.S. 618 (1978), because, in the language of Justice Brennan's concurring opinion in that case, the law "imposes a unique disability upon those who exhibit a defined level of intensity

of involvement in protected religious activity." 435 U.S. at 632.

There is another constitutionally impermissible consequence of the challenged Washington law. It has the serious effect of inhibiting and deterring religious observance. A college student who has won a Promise Scholarship and whose family cannot easily afford his or her secular college education is encouraged by this law to reduce his or her contemporaneous study of religious texts and other forms of "theology" lest the quantity of such study result in disqualification from the program. Hence there is a direct correlation between the statute and the student's adherence to religious observance. A Jewish college student who might otherwise wish to pursue the kind of intensive Torah study that could ultimately lead to rabbinic ordination – a positive commandment under Jewish Law – would hesitate and possibly avoid concentrated religious study in order not to jeopardize the financial assistance he has been awarded.

IV

NEITHER WASHINGTON'S "BLAINE AMENDMENT" NOR A "PLAY IN THE JOINTS" THEORY SUSTAINS THE RELIGIOUSLY DISCRIMINATORY STATUTE

The State seeks to rescue its statute despite its patently discriminatory purpose and effect by invoking the provision of Washington's constitution that prohibits the appropriation or application of any "public money or property . . . to any religious worship, exercise or instruction." Washington Constitution, art. I, section 11. This provision does not appear to be literally applicable to the

Promise Scholarship because, as we have noted, scholarship funds do not pay any religious teacher or purchase any religious book. Assuming, *arguendo*, however that the "Blaine Amendment" would prohibit the grant of a Promise Scholarship to the respondent because he is pursuing a degree in theology from a religious perspective, that state constitutional provision could not trump the command of the Free Exercise Clause.

Similar claims that granting equality to religious observance or speech might violate a state policy of non-establishment of religion have been rejected in cases involving access to governmentally owned property. See *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). This Court made it clear in the *Good News Club* case that a restriction that singles out religious expression can be justified by the State only if it is actually necessary to avoid violating the Establishment Clause. 533 U.S. at 112-120. If there is no actual violation of the Establishment Clause, the mere perception that a non-establishment principle might be violated is insufficient to sustain a discriminatory denial of religious expression. In the present case, the petitioners concede that permitting the respondent to qualify for a Promise Scholarship would not violate the Establishment Clause of the First Amendment to the United States Constitution. Brief for the Petitioners, pp. 4, 43. It follows, therefore, that the Blaine Amendment – which, as interpreted here, goes well beyond the Establishment Clause – cannot justify the disqualification of the respondent.

Nor does the "play in the joints" concept urged forcefully by some *amici* – including the American Jewish Congress – save Washington's discriminatory policy. It is ironic that the very same organization that adamantly

opposed the concept that local governments should be entitled to "play in the joints" that would permit greater leeway under the Religion Clauses in the 1970's and 1980's – when a majority of this Court was invalidating different forms of governmental financial assistance for education in religious schools[4] – is now claiming that federalism grants discretion to States to forbid student aid protected by the federal Constitution. In any event, "play in the joints" is not a constitutional license to harm devout religious believers such as respondent and to deny to him, in violation of the Free Exercise Clause, the same benefits that he would have if he were not motivated by conscientious convictions.

The authorization Washington is seeking – to permit its local legislature to experiment with the respondent's constitutionally protected rights – is comparable to the leeway that the State of Texas was requesting in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), in order to enforce local morals and standards of conduct. This Court held that the United States Constitution did not permit Texas to restrict sexual freedom in this manner. The Court said (123 S. Ct. at 2475):

> Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.

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[4] *E.g.*, *Committee for Public Ed. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Aguilar v. Felton*, 473 U.S. 402 (1985); *School Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985).

The constitutional right of the respondent in this case to pursue a college education consistently with his religious convictions without forfeiting the financial assistance that the State of Washington has awarded to him is surely part of the "autonomy of self that includes freedom of thought, belief, [and] expression." The "transcendent dimensions" of the liberty to observe the doctrines of one's faith are entitled to no less respect than the equivalent dimensions of the "certain intimate conduct" at issue in *Lawrence*.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

September 2003

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In the

Supreme Court of the United States

GARY LOCKE,
GOVERNOR OF THE STATE OF WASHINGTON, *ET AL.*,

Petitioners,

v.

JOSHUA DAVEY,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICUS CURIAE TERESA M. BECKER IN SUPPORT OF RESPONDENT

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EDITOR'S NOTE

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QUESTION PRESENTED

Whether a state policy stripping students of scholarship funds based upon an arbitrary and irrebuttable presumption, resulting in an arbitrary and capricious classification of citizens for the purpose of allocating a government benefit, and creating a civil disability penalizing only those students who wish to exercise their fundamental right to the Free Exercise of Religion, Free Speech, and Association for the purpose of discussion concerning religion conducted from a religious viewpoint deemed anathema by the State of Washington, violates the First Amendment of the United States Constitution as incorporated via the Fourteenth Amendment.

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1

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Amicus curiae, Teresa M. Becker, is a senior at Ave Maria College, a four year Liberal Arts institution, located in Ypsilanti, Michigan. Like Joshua Davey, Teresa received a state scholarship, Michigan's Competitive Scholarship.[2] Like Washington's Promise Scholarship, Michigan's Competitive scholarship is made available to students based on academic achievement and financial need. Like Joshua Davey, Teresa believes that she is called to study theology as part of her vocation–her calling to know, love, and serve God (and her fellow man); but she does not believe that she is called to life as a religious within the Roman Catholic Church to which she adheres as a result of her religious conviction.

As a result of her sincerely held religious conviction Teresa, like Joshua Davey, selected Theology as her undergraduate major. Upon learning that Teresa had selected Theology as her undergraduate major, the State of Michigan stripped Teresa of her Competitive Scholarship in much the same way that the State of Washington has stripped Joshua Davey of his Promise Scholarship. By its terms, the statute creating

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[1]Pursuant to Rule 37, Teresa gratefully acknowledges both Petitioner and Respondent, both of whom have kindly consented to the filing of her amicus brief. Pursuant to Rule 37.6 Teresa indicates that no party authored any part of this brief and that no person has provided any monetary support for this brief apart from those identified therein.

[2]The facts relative to Teresa's interests are matters of public record by reason of the pleadings and other papers filed in connection with her suit pending in the United States District Court for the Eastern District of Michigan, Becker v. Granhom et al., Case No. 03-CV-70429, the Hon. George Caram Steeh presiding.

Michigan's Competitive Scholarship protects students from discrimination based upon their chosen course of study but strips students of this protection (and their scholarship) if they enrolled in a course of study leading to a degree in theology, divinity, or religious education. More specifically, Michigan's law provides:

> An applicant awarded a first-year scholarship or a renewal scholarship shall not be restricted in the choice of the course of study he or she wishes to pursue, except that a scholarship award shall not be made to a student enrolled in a program of study leading to a degree in theology, divinity, or religious education.

MCL 390.977. As a result of this provision Teresa, like Joshua Davey, was stripped of a valuable government benefit made available to citizens for the purpose of facilitating their private choice in course of study simply because the promptings of her conscience led her to enroll in a course of study leading to a degree in theology, a discipline deemed anathema by the State of Michigan.

Teresa brought suit in the United States District Court for the Eastern District of Michigan seeking a preliminary injunction enjoining the defendants from stripping her of her Competitive Scholarship. *See Becker v. Granholm et al.*, Case No. 03-CV-70429. By order dated July 21, 2003, the Honorable George Caram Steeh, United States District Court Judge for the Eastern District of Michigan, entered an order enjoining the defendants in that suit from depriving Teresa of her Competitive Scholarship because she chose Theology as

her undergraduate major.[1] But the court did not grant Teresa's request for an order requiring the defendants to pay the competitive scholarship funds she was entitled to for her Junior year; instead, the court ordered the defendants to escrow the funds due to Teresa for the 2002-03 academic and fiscal year ending September 30, 2003 pending this Court's decision in this case. By stipulated order the defendants agreed to escrow funds equal to the amount of the Competitive Scholarship Teresa would receive for the 2002-03 academic and fiscal year pending this Court's decision.

Teresa has an intense and personal interest in the proper resolution of this dispute because Judge Steeh has indicated his opinion that her claims rise or fall with Joshua Davey's claims. In his order granting her motion for preliminary injunction, Judge Steeh indicated that he regards Teresa's Free Exercise claim as akin to Davey's claim, although Teresa does not believe she is called to life as a religious in the Roman Catholic Church. See 2003 WL 21714071 at p. 2. In addition, Judge Steeh has stated his opinion that if Joshua Davey's Free Exercise claim fails, then Teresa is not likely to prevail on the merits of the claims she advances under the Free Speech and Equal Protection clauses. *Id* at p. 6 n. 1. Teresa respectfully files this amicus because she believes that both she and Joshua Davey have been subject to invidious discrimination that plainly violates their right to the Free Exercise of Religion, Free Speech, and Equal Protection.

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[1] Judge Steeh's order can be found at 2003 WL 21714071 (July 21, 2003).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Washington's decision to strip Joshua Davey of his Promise Scholarship because he chose to study theology *via* courses taught from a religious perspective consistent with his religious conviction cannot withstand even the most deferential standard of review, never mind the strict scrutiny required in this case. The State's policy, which strips students like Joshua of Promise Scholarships if they choose to major in theology taught from a non-secular perspective, rests upon an arbitrary and irrebuttable presumption that scholarship monies that can be applied to a wide variety of purely secular costs incurred in connection with college instruction will be used to pay the costs of the theology courses deemed anathema by the State of Washington. This arbitrary and irrebuttable presumption, in turn, provides the basis for a wholly arbitrary and capricious classification of citizens based on "declared major" that has nothing to do with the actual use of Promise Scholarship funds. And precisely because Washington's policy is so plainly arbitrary and capricious, the result of that policy is to make eligibility for its Promise Scholarship turn on an unconstitutional condition; the policy creates an illicit *quid pro quo* whereby students who wish to receive Washington's Promise Scholarship must foreswear a course of study chosen as a result of private choice and sincerely held religious conviction. For these related reasons, among others, the Ninth Circuit's decision should be affirmed.[1]

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[1]Becker believes that Washington's policy violates Davey's right to Free Exercise, Free Speech, and Equal Protection for the reasons stated by Davey, among others. Consistent with her role as amicus she will not reiterate the arguments advanced by Joshua but only highlights a few of the wholly arbitrary and capricious means that the State of Washington has employed in connection with its decision to strip Joshua of his Promise Scholarship.

ARGUMENT

Washington's decision to strip Joshua Davey of his Promise Scholarship because he chose to major in theology and receive instruction *via* courses taught from a religious perspective consistent with his religious conviction violates at least three well established lines of this Court's jurisprudence in addition to those that Davey has primarily relied upon. First, Washington's policy violates two parallel lines of cases, developed under the Due Process and Equal Protection clauses, which recognize that classifications based on gross generalizations, conclusive presumptions, or arbitrary preferences are void. Second, this Court has consistently voided restrictions which make eligibility for government benefits turn on the sacrifice of fundamental rights. Taken together these lines of authority demonstrate that Washington's policy is unlawful such that the decision of the United States Court of Appeals, Ninth Circuit, should be affirmed.

I. Washington's Policy Barring Receipt of Promise Scholarships by Students Majoring in Theology Taught from a Religious Viewpoint Deemed Anathema by the State Violates Due Process and Equal Protection.

Washington's decision to strip Joshua Davey of his Promise Scholarship because he chose to study theology *via* courses that Washington does not deem sufficiently secular violates both Due Process and Equal Protection even under the most deferential standard of review. In this case, there is no question that the

Promise Scholarship can be used to pay a wide variety of legitimate and purely secular expenses typically incurred in connection with college study including tuition, room and board, books and materials, and transportion. See 1999 Wash. Laws ch. 309, §611(6)(i)(vii). Likewise, there is no dispute that Joshua Davey had a double major in Pastoral Ministries and Business Management/Administration. JA 43. The State of Washington awarded a total of $2,667 to Joshua in connection with his first two years of college. JA 55, 76, 95, 175, 178, 185.

Joshua was stripped of his Promise Scholarship because he chose to major in Pastoral Ministries. JA 77 pursuant to Wash.Rev. Code §28B.10.814 & §28B.119.010(8). As interpreted and applied by Washington, these statutes strip students like Joshua of their Promise Scholarships if they choose to major in theology *via* courses the State deems anthema because they are taught from a religious viewpoint or, put another way, a viewpoint that the State does not deem sufficiently secular. See Pet. Br. At 6. (law disqualifies student studying theology only where subject is tuaght from a perspective that is "devotional in nature or designed to induce religious faith."). Washington attempts to defend this gross discrimination against students who wish to study theology from a viewpoint consistent with their religious conviction on the grounds that the State has chosen to fund secular–but not religious–instruction. See Pet. Br. at p. i (Question Presented).

A. Washington's Policy Rests upon an Arbitrary and Irrebuttable Presumption That Violates Due Process.

Washington's effort to defend its gross discrimination against students who wish to study theology from a viewpoint consistent with their religious conviction on the grounds that the State has chosen to fund secular–but not religious–instruction is wholly untenable. For it is immediately apparent that Washington's policy rests upon nothing more than a wholly arbitrary presumption that the State employs as an accounting convention. More specifically, Washington has chosen to presume that the few thousand dollars Joshua Davey was entitled to receive *via* a Promise Scholarship would be spent upon the very sort of instruction the State will not allow the funds to pay for–as opposed to the countless secular expenses that Davey incurred in connection with his college study, such as room and board, transportation, or the costs of books or tuition incurred to pay for instruction in courses that have nothing to do with theology taught from a viewpoint.

There is no basis for this perverse presumption that Promise Scholarship funds will be used for proscribed purposes in reason or justice. Quite the contrary, the perverse presumption that Washington has chosen to employ in the administration of its Promise Scholarship program is wholly arbitrary and capricious, presuming that students like Davey will gratuitously apply funds in a manner forbidden by state law as opposed to using those funds for lawful purposes that advance the student's goal of securing a college degree.

The wholly arbitrary and capricious nature of the presumption that Washington employs in connection with its administration of Washington's Promise Scholarship is all the more egregious because it is an irrebuttable presumption. As noted above, Promise Scholarship funds can be used to pay for any number of permissible secular expenses inevitably incurred in connection with securing a college degree. In this case, moreover, Davey had a double-major such that Promise Scholarship funds could be used to pay for instruction in his Business Management/Administration major, one that the State of Washington finds less offensive if only because it is secular. Indeed, Washington concedes that Davey could have used these funds to pay for his Business Management/Administration degree if he were pursuing that course of study at another institution where he was not seeking a degree in theology. See Pet. Br. at 12, 20, 24-25, 38-39. Nonetheless, Davey was stripped of his Promise Scholarship because he has a double major at one school.

Washington's acknowledgment that Davey could use Promise Scholarship funds to pay for his secular Business Management/Administration major if he were pursuing that course of instruction at another institution where he was not pursuing a degree in Theology highlights the arbitrary and irrebuttable presumption it has employed in the administration of its Promise Scholarship. For that concession demonstrates that Davey has been stripped of his Promise Scholarship simply because Washington presumes that if Promise Scholarship funds pass to a institution where a student is receiving instruction in theology, then those funds are used to pay for theology course. There is no basis for this perverse presumption in logic or justice. Indeed, the formalistic means that State would have Davey to employ in order to avoid its perverse and irrebuttable

presumption (i.e. enroll in two different colleges at the same time) speak volumes insofar as they belie Washington's claimed interest and demonstrate the wholly arbitrary nature of its policy.

Washington's policy is wholly inconsistent with this Court's decisions voiding arbitrary and capricious classifications that burden a group of citizens based on gross generalizations or conclusive presumptions. *See e.g. Romer v. Evans*, 517 U.S. 620 (1996)(Amendment which placed homosexuals in a solitary class with respect to transactions and relations in both the private and governmental sphere violated equal protection because it imposed a broad and undifferentiated disability on a single named group amounting to a special disability upon that group alone); *Cleveland Board of Ed v. LaFluer*, 414 U.S. 632 (1974)(Regulations requiring teachers to take leave four to five months before due date of child violated due process because arbitrary periods did not consistently serve to ensure stated goal of preserving continuity in instruction and swept too broadly by creating a conclusive presumption that teacher would not be fit to teach; requirement of three month delay before return to work after birth violated due process because it created an irrebuttable presumption that mother was not fit to return to work); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977)(Zoning ordinance which barred grandchild from living with the grandmother while allowing other relatives to live together was an arbitrary interference with family life); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985)(City ordinance requiring special use permit for proposed group home for mentally retarded but not other similarly situated uses violated equal protection given lack of rational basis for stated belief that group home posed special threat to legitimate interests).

In each of these cases, this Court recognized that policies limiting individual liberty or property interests based on nothing more than arbitrary assumptions and effectively irrebuttable presumptions violate Due Process or Equal Protection. Significantly, these decisions did not entail any heightened standard of review. The challenged regulation failed precisely because it rested on an arbitrary generalization or a presumption that was effectively irrebuttable.

Washington's policy for administration of the Promise Scholarship, which rests upon a perverse and irrebuttable presumption that students will use Promise Scholarship funds for an illicit purpose (i.e. to pay for theology courses taught from a religious perspective) as opposed to a lawful purpose (i.e. to pay for many other legitimate expenses) offends Due Process precisely because it is perverse, irrational, and irrebuttable. For this reason alone the Ninth Circuit's decision should be affirmed.

B. Washington's Policy Also Violates Equal Protection Because it Employs an Arbitrary and Capricious Classification of Citizens for the Purpose of Allocating a Government Benefit.

Washington's policy also results in a wholly arbitrary classification of citizens for the purpose of receiving this benefit. Washington frankly concedes the facts that highlight this wholly arbitrary and capricious classification of students for the purpose of determining their continued eligibility for Promise Scholarships. One the one hand, Washington seeks to justify its policy on the grounds that the State does not want Promise Scholarship funds to fund religious instruction. See Pet.

Br. at p. I (Question Presented). On the other hand, Washington concedes that a student would receive a Promise Scholarship even if that student were enrolled in courses teaching theology from a religious perspective–so long as the student does not declare a major in theology taught from a religious perspective. Pet. at 17.

Washington's concessions conclusively demonstrate that its policy turns on an absolutely arbitrary and capricious classification that has nothing to do with its stated concern i.e. the use of public funds to pay for religious instruction but, instead, hinges solely on a purely formal inquiry: whether a student has declared a Theology major. Here again the results of Washington's policy offend reason and justice. On the one hand, Joshua Davey cannot use Promise Scholarship funds to pay for secular instruction received in connection with his Business Management/Administration major because he also declared a major in Theology. On the other hand, Joshua's classmates in the Business Management/Administration can use Promise Scholarship funds to pay for the very theology courses Joshua takes as a Theology major simply because those classmates have not declared a major in theology. Washington's policy is so arbitrary that achieves no purpose relating to the administration of the Promise Scholarship except targeting–and penalizing–those students who actually declare a major in Theology.[3]

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[3] For good reason the State has not attempted to justify its targeting of Theology majors as designed to ensure that public funds do not go to individuals who intend to become clergy or religious because any effort to identify and disqualify students based on their declared majors would be just as arbitrary as the state's current scheme. This case provides a perfect example.

Washington's arbitrary targeting of students declaring certain Theology majors, and its arbitrary preference for students declaring majors deemed acceptable by the State, is precisely the sort of arbitrary and status-based classification system that cannot satisfy the requirements of Equal Protection under even the most deferential standard of review. This Court has repeatedly invalidated classifications designed to benefit certain citizens based on arbitrary preferences. *See, e.g., Zobel v. Williams*, 457 U.S. 55 (1982)(Program distributing revenue dividends to residents based on duration of residency violated equal protection because goal of classification was to provide greater benefit to those who had resided longer in the State.); *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 488 U.S. 336 (1989)(Assessment practice which effectively limited meaningful valuation adjustments to transfer of property thereby creating arbitrary disparities in tax burdens violated equal protection); *Williams v. Vermont*, 472 U.S. 14 (1985)(Regulation that allowed Vermont residents registering vehicle to reduce use tax by a credit in amount of use or sales tax paid to another state if person was Vermont resident at time of vehicle was purchased but denying credit to Vermont residents if they were not Vermont residents at time vehicle was purchased created an arbitrary classification that violated due process); *Hooper v. Bernalillo County*, 472 U.S. 612 (1985)(Statute granting tax exemption to Vietnam veterans who resided in the state before May 8, 1976 violated equal protection

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Joshua Davey believed he was called to ministry as a freshman in college; but he is currently enrolled in Harvard Law School; who can tell where he will believe he is called to serve God as a result of continued prayer and reflection? Information relating to Davey's enrollment can be found at www.aclj.org/jsl/030519daveytranscript.asp

because it was plainly designed to favor residents before that date over newcomers).

This well established line of cases prevents Washington from using arbitrary and status-based preferences to benefit a class of citizens based on generalized notions concerning contributions to the community etc. Washington's policy is plainly based on just this sort of arbitrary preference presuming that declared Theology majors are somehow less likely to contribute to the common good than students declaring other majors. But, as demonstrated above, Washington's policy has nothing to do with the actual use of Promise Scholarship funds. Quite the contrary Washington's policy governing use of Promise Scholarship funds makes eligibility turn on a purely formal inquiry regarding "declared" major that achieves nothing but a status-based exclusion from the Scholarship program heaped on certain students who wish to study a discipline taught from a religious viewpoint deemed anathema by Washington.

It is telling that Washington employs the most hollow formalism in an effort to defend its policy. Washington indicates in its briefing that Davey could have enrolled in two colleges or that he should not have declared his major until his Junior year so that he could avoid the plainly absurd (and unjust) result produced by the State's policy. Fortunately, Davey need not resort to such subterfuge because Washington's policy turns on the very sort of arbitrary classifications and preferences that violate even the lowest level of protection provided by the Equal Protection clause. For this reason alone, the Ninth Circuit's decision should be affirmed.

II. Washington's Policy Stripping Students Of Their Promise Scholarship If They Chose To Major In Theology Courses Deemed Anathema By The State Is Void Because It Makes Eligibility For The Promise Scholarship Turn On An Unconstitutional Condition.

As demonstrated above, Washington's policy makes eligibility for Promise Scholarships turn on purely arbitrary factors that have nothing to do with the actual use of scholarship funds. Indeed, Washington's policy makes eligibility for a Promise Scholarship turn on an unconstitutional condition precisely because the State's policy turns on arbitrary factors wholly unrelated to the actual use of scholarship funds. Although Washington concedes that it has no right to prevent Joshua Davey from using his own money to pay for theology courses taught from a religious perspective, *see* Pet. Br. at p. 25, its policy does just that; for Joshua must forfeit his scholarship even if he uses personal funds to pay for such courses. Seen in this light it is evident that Washington's policy creates an illicit *quid pro quo* that requires Davey to relinquish his fundamental rights to Free Speech, Association, and the Free Exercise of religion in order to remain eligible for his Promise Scholarship.

This Court has repeatedly rejected policies which create an illicit quid pro quo, forcing citizens to relinquish fundamental rights in exchange for a government benefit. Washington's policy plainly fails this test. Joshua must renounce his efforts to pursue his vocation *via* training in Theology if he wishes to receive his Promise Scholarship. By the same token, Joshua must renounce his right to speech and association if he

wishes to enjoy the Promise Scholarship. Thus Washington's policy makes continued eligibility for a Promise Scholarship turn on wether students like Davey will forgo the exercise of their rights to Free Speech, Freedom of Association and the Free Exercise of Religion.

It is fundamental that the State cannot penalize its citizens for the free exercise of religion by conditioning eligibility for government programs on conduct that burdens religious exercise for a simple reason. As this Court stated long ago, "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial or placing of conditions upon a benefit or privilege" and, as a result, "conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms." *Sherbert v. Verner*, 374 U.S. 398, 405 (1963)(Requirement that plaintiff accept job requiring work on Sabbath contrary to plaintiff's religious conviction in order to be eligible for unemployment benefits was an unconstitutional burden on Free Exercise of religion because it forced plaintiff to choose between exercise of religious conviction and public benefit) (*citations and quotations omitted*); *see also Wisconsin v. Yoder*, 406 U.S. 205 (1972)(Application of compulsory secondary education requirement to Old Order Amish violated Free Exercise clause given religious belief preventing compliance with requirement and importance of parental right to supervise education of children); *Thomas v. Review Board*, 450 U.S. 707 (1981)(rule making plaintiff ineligible for unemployment compensation because he quit job which entailed making armaments pursuant to his religious conviction violated Free Exercise because it conditioned receipt of benefits on violation of religious belief); *Hobbie v.*

Unemployment Appeals Comm, 480 U.S. 136 (1987)(rule disqualifying woman fired for refusal to work on Sabbath from eligibility for unemployment benefits infringed her right to Free Exercise of religion). These cases make it clear that Washington's policy violates Davey's Free Exercise rights.

Likewise, this Court has consistently voided efforts to condition eligibility for access to government benefits on the waiver of fundamental rights to speech and association. Thus for example, in *Rutan v. Republican Party of Illinios*, 497 U.S. 62 (1990), the Supreme Court struck down an governor's executive order designed to ensure that hiring, rehiring, transfer, and promotion was limited to employees with connections to the Republican Party, specifically rejecting the assertion that conditioning employment decisions on political association was permissible because no employee had a right to the benefits at issue. The Court wrote:

> For at least a quarter-century, this Court has made clear that even though a person has no right to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government many not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interest in freedom of speech. For if the government could deny a benefit to a person because of nis constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would

> allow the government to produce a result which it could not command directly.

Rutan, 497 U.S. at 72 (internal quotation, brackets, and citations omitted); *see also Perry v. Sinderman*, 408 U.S. 593, 598 (1972) (may not condition public employment opportunities on waiver of First Amendment rights); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (withholding passport of Communist Party member violated freedom of association); *Speiser v. Randall*, 357 U.S. 513 (1958) (tax exemption conditioned on applicant's pledge not to advocate forcible overthrow of government was unconstitutional).

This convergence of controlling law under the Free Exercise and Free Speech provisions permits only one result in this case: Washington cannot require Joshua Davey to relinquish his fundamental rights as a condition for eligibility for a Promise Scholarship made available to all students so they can pursue their privately chosen course of study. Washington seeks to do just that by reason of its policy barring declared Theology majors from Promise Scholarships if they receive instruction *via* courses taught from a religious perspective. For this reason alone, the Ninth Circuit's decision should be affirmed.

CONCLUSION

Washington's policy stripping students of Promise Scholarship funds if they declare a major in Theology and receive instruction *via* courses deemed to be insufficiently secular by the State cannot withstand even the most deferential standard of review, never mind the strict scrutiny that governs in this case. Washington's policy employs an arbitrary, capricious,

and irrebuttable presumption that strips certain students of their scholarship based on a perverse and irrebuttable presumption that Promise Scholarship funds will be improperly used by students who declare a major in Theology. Similarly, the result of Washington's policy is to create a wholly arbitrary and status-based classification system that has no meaningful relationship with the actual use of Promise Scholarship funds but does burden or benefit students eligible for Promise Scholarships based on nothing more than their decision to declare a Theology major. And precisely because Washington's administration of its Promise Scholarship turns on arbitrary factors having nothing to do with the actual use of scholarship funds it is evident that the effect of Washington's policy is to make continued eligibility for Promise Scholarships turn on an unconstitutional condition, requiring students like Joshua to forgo exercise of their fundamental rights to Free Speech, Association, and the Free Exercise of Religion in order to remain eligible for that benefit. For all these reasons Washington's policy violates the First and Fourteenth Amendments to the United States Constitution and, as a result, the Ninth Circuit's decision voiding Washington's policy should be affirmed.

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In the Supreme Court of the United States

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v.

JOSHUA DAVEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a State may deprive an otherwise eligible student of scholarship funds made available to high school graduates based on academic achievement, financial need, and enrollment at an accredited post-secondary school, solely because the student elects to major in theology taught from a religious perspective.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The Washington promise scholarship program makes education aid available to high school graduates on the basis of academic performance, financial need, and enrollment at an accredited college or university, but disqualifies otherwise eligible students if they elect to pursue a major in theology taught from a religious perspective. The court of appeals held that the program violates the First Amendment rights of otherwise eligible students, such as respondent, who are deprived of a promise scholarship solely because they choose to pursue a religious education. That decision is correct and compelled by this Court's precedents.

The United States has a significant interest in the constitutional principles governing this case. Congress has enacted several programs that make funds available to disadvantaged individuals to obtain services from qualified entities of their own choosing, regardless of the religious affiliation, if any, of such entities. See, *e.g.*, 42 U.S.C. 9858n(2); 42 U.S.C. 604a(a)(2)(B)(ii), (c), and (e)(1). At the same time, Congress has enacted programs that make aid available

directly to public and private schools and that specify that such direct aid may not be used for programs that involve religious instruction or worship. See, *e.g.*, 20 U.S.C. 1062(c)(1), discussed note 4, *infra*.

In addition, Congress has recognized the United States' interest in eliminating discrimination because of religion by authorizing the United States to intervene in federal cases seeking relief from a denial of equal protection of the laws under the Fourteenth Amendment on account of, *inter alia*, religion. 42 U.S.C. 2000h-2. The United States has a vital interest in ensuring that educational opportunities are available to all individuals consistent with the protections of the First and Fourteenth Amendments.

STATEMENT

1. In 1999, Washington established a pilot program—the promise scholarship program—to reward superior academic achievement and encourage successful high school students from low- and middle-income families to pursue post-secondary educational opportunities. See Wash. Rev. Code § 28B.119.005 (2002); J.A. 50. The program is administered by the Washington Higher Education Coordinating Board (Board) and was opened in 1999 to any student graduating from public and approved private high schools in Washington who met three eligibility criteria: (1) the student finished in the top 10% of his graduating high school class; (2) the student's family income was equal to or less than 135% of the State's median; and (3) the student was enrolled in an accredited university in Washington. J.A. 51; Pet. App. 8a-9a.

Under the program, scholarships are made available to eligible students during the first year of a student's post-secondary education and may be renewed for one additional year. The amount of the scholarship depends on the available funding and the number of eligible aid recipients in a given year. The scholarship was worth $1125 per student in 1999-2000, and $1542 per student in 2000-2001. Pet. App. 8a, 52a-53a. Scholarship funds are sent to schools and held in the qualifying student's name. The institution must certify that the student is enrolled and eligible to receive the award before the scholarship funds are released. The funds may be used for education-related expenses, including tuition, books, or room and board. See J.A. 50-54, 57-58; Pet. App. 52a-53a.

In October 1999, the Board notified administrators at accredited institutions that students who are otherwise eligible to receive a promise scholarship may *not* receive such a scholarship if they elect to pursue a degree in theology. J.A. 61-62; Pet. App. 10a & n.3. The Board explained that the Washington constitution has long been "interpreted * * * as prohibiting state financial aid funds for students who are pursuing a degree in theology." J.A. 61-62; see 1969 Wash. Laws ch. 222, § 15 ("No aid shall be awarded to any student who is pursuing a degree in theology."), codified at Wash. Rev. Code § 28B.10.814 (2002).[1] The legislature later established that "[promise] scholarships may not be awarded to any student who is pursuing a degree in theology." Wash. Rev. Code § 28B.119.010(8) (2002). The Board's regulations contain the same disqualification provision. Wash. Admin. Code § 250-80-020(12)(g) (2003).

The prohibition on awarding promise scholarships to students who declare a major in theology applies only to theology that is taught from a religious perspective—"that is, instruction 'that resembles worship and manifests a devotion to religion and religious principles in thought, feeling, belief, and conduct.'" Pet. Br. 22-23 (quoting *Calvary Bible Presbyterian Church* v. *Board of Regents of Univ. of Wash.*, 436 P.2d 189, 193 (Wash. 1967), cert. denied, 393 U.S. 960 (1968)). Thus, a student may use scholarship funds to study

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[1] Article I, § 11, of the Washington constitution provides in part that "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment." See Pet. Br. 2-3; Pet. App. 88a.

comparative religion from a secular point of view, but he is disqualified from such funds if he studies religion from the point of view of those who accept religion as truth or seek to inculcate its beliefs (or disbeliefs). Pet. Br. 5-6, 22-23, 43.

2. Respondent is a Christian who, because of his religious beliefs, has "planned for many years to attend a Bible college and to prepare [himself] through that college training for a lifetime of ministry, specifically as a church pastor." J.A. 40, 43; see Pet. Br. 9. In August 1999, he was awarded a promise scholarship based on his superior high school academic record and financial need. Pet. App. 9a; J.A. 53-54. Petitioner Locke sent respondent an award certificate and letter congratulating him on his selection as a promise scholarship recipient and informing him that the scholarship was $1125 for the 1999-2000 school year. J.A. 55-56, 76. Respondent enrolled in Northwest College, a private Christian college located in Kirkland, Washington, which is accredited by the State and offers degrees in both religious and secular fields of study. Pet. App. 9a, 53a-54a. He declared a double major in pastoral ministries and business management, the education that he believed would "best prepare [him] for the complex management and spiritual tasks that comprise contemporary Christian ministry." J.A. 43.

Students who major in pastoral ministries at Northwest are pursuing a degree in theology taught from a religious perspective and thus are disqualified from promise scholarships. Pet. App. 10a; Pet. Br. 10-11. In October 1999, respondent was informed by the financial aid director at Northwest that, under the program's terms, he would have to forfeit his promise scholarship if he did not abandon his major in pastoral ministries. J.A. 45. Because respondent refused to abandon his chosen educational objective, he was deprived of his promise scholarship. Pet. App. 10a.

3. In January 2000, respondent filed this action in the District Court for the Western District of Washington, arguing, *inter alia*, that the Board's policy of denying promise scholarship funds to otherwise eligible students solely on the basis of their decision to major in theology violates the Free Exercise Clause, Establishment Clause, and Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. J.A. 11-15. He sought a declaration that the Board's policy is unlawful, an injunction reinstating his promise scholarship, and certain other relief. J.A. 20-21. After the district court denied respondent's request for a preliminary injunction, see J.A. 75-81, the parties filed cross-motions for summary judgment. In October 2000, the district court granted summary judgment for petitioners, rejecting respondent's First Amendment and other claims. Pet. App. 51a-85a.

4. The court of appeals reversed. Pet. App. 1a-50a. The court held that the promise scholarship program violates the Free Exercise Clause insofar as it "conditions receipt of the Promise Scholarship on the recipient's not pursuing a degree in theology taught from a religious perspective," and that the Board's "classification based on religion is unconstitutional as applied through [the Board's] policy to [respondent]." *Id.* at 30a. In so holding, the court emphasized that the terms of the program and the administrative policy implementing it "necessarily communicate[] disfavor" of students who choose a path of religious study, and "discriminate[] in distributing the subsidy in such a way as to suppress a religious point of view." *Id.* at 22a.

Judge McKeown dissented. Pet. App. 31a-50a. In her view, "[t]his is a funding case, not a free exercise case or a free speech case," and "the State of Washington may constitutionally decline to fund pastoral studies as part of its Promise Scholarship." *Id.* at 33a.

SUMMARY OF ARGUMENT

The court of appeals correctly held that the First Amendment prohibits petitioners from making promise scholarships

available to all students who meet the academic performance, financial need, and enrollment criteria, except those who choose to pursue a degree in theology taught from a religious viewpoint.

A. The Establishment Clause, Free Exercise Clause, and Free Speech Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment overlap and reinforce one another in requiring the State to maintain a position of neutrality with respect to religion and forbidding discrimination on account of religious beliefs or practices. The provision of the Washington program that disqualifies otherwise eligible students from a promise scholarship based solely on their decision to pursue a theology degree taught from a religious perspective directly contravenes those constitutional commands. Indeed, that provision engages in quintessential viewpoint discrimination against the study of religion from a religious perspective and sends the stigmatizing message that the State disfavors promising students who choose to pursue such religious studies.

B. The court of appeals correctly held that the Washington program violates the Free Exercise Clause. That Clause protects individuals from laws that impose special disabilities on the exercise of religious beliefs or practices. Laws that "target[] religious conduct for distinctive treatment," and thus are neither neutral nor generally applicable, are subject to strict scrutiny. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 546 (1993). The Washington program is neither neutral nor generally applicable. On its face, the program and the Board's policy administering it disqualify any student who is pursuing a degree in theology. Nor is there any dispute that the disqualification provision targets theology taught from a religious perspective. See Pet. Br. 5-6, 22-23, 43. Indeed, the very reason for the disqualification is the inherently religious nature of such studies. Accordingly, the program's

disqualification provision must undergo the most searching constitutional scrutiny.

The disqualification provision does not survive such scrutiny, as petitioners all but concede by devoting their efforts to attempting to show that strict scrutiny is not applicable. Although a State may have a compelling interest in drawing religious classifications to avoid the violation of the federal Establishment Clause, that interest is not implicated by the private-choice program in this case. See *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002); *Witters* v. *Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986). In addition, although States have a strong interest in complying with their own laws, that interest does not justify imposing special disabilities on religious activity that violate the Free Exercise Clause. *Widmar* v. *Vincent*, 454 U.S. 263 (1981); *McDaniel* v. *Paty*, 435 U.S. 618 (1978). Nor does the disqualification provision advance the stated secular purpose of the program. The State's objectives in rewarding educational achievement and in encouraging the pursuit of opportunities in higher education are fully served by rewarding superior students without regard to whether they choose a secular course of study.

C. The Court's funding decisions reinforce the conclusion that the program's disqualification provision impermissibly targets religious pursuits for disfavored treatment. While the government generally enjoys substantial leeway in deciding what activities to fund, see, *e.g.*, *Rust* v. *Sullivan*, 500 U.S. 173 (1991), that latitude does not trump the "constitutionally imposed 'governmental obligation of neutrality' originating in the Establishment and Freedom of Religion Clauses of the First Amendment." *Maher* v. *Roe*, 432 U.S. 464, 475 n.8 (1977). Moreover, in *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), this Court invalidated under the First Amendment a public university's program that made funds available to a variety of

student activities, except student publications with a religious viewpoint. Here, as in *Rosenberger*, the First Amendment prevents the State from singling out and excluding religious viewpoints from the educational opportunities and university discourse that the State otherwise chooses to subsidize—an area that is rich in expressive conduct protected by the First Amendment.

D. States retain substantial leeway under the Constitution in making funding decisions that may indirectly affect religion, but do not target religious pursuits for discriminatory treatment. For example, a State may choose based on a neutral secular objective to make scholarship funds available only to students who pursue courses in fields of study deemed important for technological advancement (*e.g.*, computer sciences), or who choose to attend public colleges or universities. But the First Amendment prevents a State from establishing a program that is designed to create educational opportunities for all promising high school graduates based on neutral, secular criteria such as academic performance and financial need, but disqualifies students who meet those criteria solely because they pursue religious study.

ARGUMENT

THE FIRST AMENDMENT PROHIBITS PETITIONERS FROM DISQUALIFYING OTHERWISE ELIGIBLE STUDENTS SUCH AS RESPONDENT FROM PROMISE SCHOLARSHIPS BASED SOLELY ON THEIR DECISION TO PURSUE A THEOLOGY MAJOR TAUGHT FROM A RELIGIOUS PERSPECTIVE

A. The Provisions Of The First And Fourteenth Amendments Reinforce One Another And Prohibit The State From Singling Out Religion For Discriminatory Treatment

The Establishment Clause, Free Exercise Clause, and Free Speech Clause of the First Amendment and the Equal

Protection Clause of the Fourteenth Amendment overlap and reinforce one another by requiring the government to assume a position of "wholesome 'neutrality'" with respect to religion. *School Dist. of Abington Township* v. *Schempp*, 374 U.S. 203, 222 (1963); see *Board of Educ. of Kiryas Joel Village School Dist.* v. *Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring in part and concurring in the judgment) ("[T]he Religion Clauses * * * and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not to affect one's legal rights or duties or benefits."). That principle—and the corollary that the State may not target religion for disfavored treatment—is the starting point for this case.

The Establishment Clause acts as a limitation on "the scope of legislative power" to either advance or inhibit religion, which "is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor prohibits religion." *Abington Township*, 374 U.S. at 222; see *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 648-649 (2002). Although most of this Court's Establishment Clause cases have involved challenges to laws that allegedly benefitted religion, the Court has long recognized that the Establishment Clause forbids laws that *disadvantage* religion as well. See *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993); see also *Kiryas Joel*, 512 U.S. at 728 (Kennedy, J., concurring in the judgment) ("[T]he Establishment Clause forbids the government to use religion as a line-drawing criterion.").

In determining whether a law that allegedly impermissibly benefits religion violates that principle of neutrality, this Court has considered whether a "reasonable observer" would believe that the State is endorsing a religious practice or belief. *Zelman*, 536 U.S. at 655; see *Mitchell* v. *Helms*, 530

U.S. 793, 835 (2000) (plurality); *id.* at 843 (O'Connor, J., joined by Breyer, J., concurring in the judgment); *Witters* v. *Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 493 (1986) (O'Connor, J., concurring in part and concurring in the judgment). The conclusion that a reasonable observer would believe that the State is *hostile* toward religion similarly bears on whether a law impermissibly inhibits religion. See *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 846 (1995) (O'Connor, J., concurring); *McDaniel* v. *Paty*, 435 U.S. 618, 636 (1978) (Brennan, J., joined by Marshall, J., concurring in the judgment) (a law that "manifests patent hostility toward, not neutrality respecting, religion * * * has a primary effect which inhibits religion").

"[A] further reason for neutrality is found in the Free Exercise Clause, which recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state." *Abington Township*, 374 U.S. at 222. As this Court has observed, "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Lukumi*, 508 U.S. at 532. The Free Exercise Clause thus prevents a State from "impos[ing] special disabilities on the basis of religious views or religious status." *Employment Div., Dep't of Human Res.* v. *Smith*, 494 U.S. 872, 876-877 (1990) (citing *McDaniel* v. *Paty*, 435 U.S. 618 (1978)).

Lukumi recognizes that the Equal Protection Clause provides analogous protection against government action that singles out individuals because of their religion and subjects them to discriminatory treatment. In discussing the free exercise claim in that case, Justice Kennedy referred to the Court's equal protection jurisprudence and observed that determining a statute's neutrality may involve "an equal

protection mode of analysis." 508 U.S. at 540 (quoting *Walz* v. *Tax Comm'n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)). At the same time, the Court has grouped discrimination against individuals based on religion with discrimination based on race in discussing the Equal Protection Clause. See *Burlington No. R.R.* v. *Ford*, 504 U.S. 648, 651 (1992); *American Sugar Ref. Co.* v. *Louisiana*, 179 U.S. 89, 92 (1900); see also *Kiryas Joel*, 512 U.S. at 728 (Kennedy, J., concurring in the judgment) ("Just as the government may not segregate people on account of their race, so too it may not discriminate on the basis of religion. The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial.").

Similarly, the Free Speech Clause requires government to remain neutral with respect to religious viewpoints when it facilitates private expression in a public forum. In *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. at 822-823, the Court held that a public university violated the Free Speech Clause when it authorized payments from a student activity fund to a variety of student publications, but refused to authorize such payments for student publications with a religious viewpoint. As the Court explained, moreover, in singling out religious viewpoints for such "disfavored treatment," the university not only violated the free speech rights of students, but it impermissibly compromised "[t]he neutrality commanded of the State by the separate Clauses of the First Amendment." *Id.* at 831, 845; see *id.* at 845-846; see also *Lukumi*, 508 U.S. at 543 (discussing "parallels" between protections guaranteed by the Free Speech and Free Exercise Clauses).

The Washington promise scholarship program violates those overlapping commands of the First and Fourteenth Amendments by singling out and disqualifying students who otherwise meet the neutral eligibility criteria such as academic performance and financial need based solely on their

decision to pursue a major in theology taught from a religious perspective. Indeed, the program on its face creates a stigmatizing religious classification for receipt of educational assistance that may alter the lives of high school graduates. The court of appeals decided this case under the Free Exercise Clause and thus did not need to consider respondent's claims under the other provisions of the First and Fourteenth Amendments. As explained below, the court of appeals' free exercise analysis is correct, but the First and Fourteenth Amendments provide several different paths to the same end in this case.

B. The Program's Disqualification Provision Violates The Fundamental Constitutional Command That The State May Not Target Religion For Discriminatory Treatment

The court of appeals held that "denying a Promise Scholarship to a student otherwise qualified for it according to objective criteria solely because the student decides to pursue a degree in theology from a religious perspective infringes [the student's] right to the free exercise of his religion." Pet. App. 30a. That conclusion is correct and compelled by this Court's decisions.

1. The Free Exercise Clause protects individuals from laws that target religious beliefs or practices. See *Employment Div.*, 494 U.S. at 877; *Lukumi*, 508 U.S. at 532-533. In *Lukumi*, this Court held that "[a] law burdening religious practice that is not neutral or not of general applicability must undergo the most rigorous of scrutiny"—*i.e.*, "[t]o satisfy the commands of the First Amendment, [such] a law * * * must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." 508 U.S. at 546 (internal quotation marks omitted). A law fails the neutrality requirement if it "targets religious conduct for distinctive treatment," or otherwise "infringe[s] upon or restrict[s] practices because of their religious motivation." *Id.* at 533-534. "[O]nly in rare cases" will "[a] law that targets religious conduct for distinctive treatment" comport with the liberty guarantee of the Free Exercise Clause. *Id.* at 546.

Although the Free Exercise Clause protects individuals against discrimination "which is masked as well as overt," *Lukumi*, 508 U.S. at 534, "the *minimum* requirement of neutrality is that a law not discriminate on its face," *id.* at 533 (emphasis added). See also *id.* at 557 (Scalia, J., joined by the Chief Justice, concurring in part and concurring in the judgment) ("[T]he defect of lack of neutrality applies primarily to those laws that *by their terms* impose disabilities on the basis of religion (*e.g.*, a law excluding members of a certain sect from public benefits, cf. *McDaniel* v. *Paty*, 435 U.S. 618 (1978)).") (emphasis in original).

The Court has pointed to *McDaniel* v. *Paty*, *supra*, as a prototypical example of a law that impermissibly discriminates on its face against religion. See *Lukumi*, 508 U.S. at 523, 533; *Employment Div.*, 494 U.S. at 877. In *McDaniel*, the Court held that a Tennessee statute that disqualified clergy from serving as delegates to state constitutional conventions violated the First Amendment. 435 U.S. at 621, 629. Chief Justice Burger, writing for a plurality of the Court, explained that "the right to the free exercise of religion unquestionably encompasses the right to preach, proselyte, and perform similar religious functions, or, in other words, to be a minister," and that the State's "clergy-disqualification" violated that right by conditioning the [plaintiff]'s eligibility to be a state constitutional delegate on the surrender of his religious calling. *Id.* at 626. In other words, quoting the Writings of James Madison, the plurality concluded that the State had impermissibly "punish[ed] a religious profession with the privation of a civil right." *Ibid.*

Justice Brennan, joined by Justice Marshall, concurred in the judgment in *McDaniel*. As he explained, the clergy-disqualification provision "imposes a unique disability upon

those who exhibit a defined level of intensity of involvement in protected religious activity." 435 U.S. at 632. In agreeing with the plurality that the provision violated the Free Exercise Clause, Justice Brennan rejected the notion "that the law does not interfere with free exercise because it does not directly prohibit religious activity, but merely conditions eligibility for office on its abandonment." *Id.* at 633. Rather, as he explained, "in prohibiting legislative service because of a person's leadership role in a religious faith, Tennessee's disqualification provision imposed an unconstitutional penalty upon [the plaintiff's] exercise of his religious faith." *Ibid.* (internal quotation marks and citation omitted).[2]

2. As the court of appeals explained, the promise scholarship program "lacks neutrality for the same reason that Tennessee's disqualification of ministers from public office, invalidated in *McDaniel*, lacked neutrality." Pet. App. 15a. On its face, the program (see Wash. Rev. Code § 28B.119.010(8) (2002); Wash. Admin. Code § 250-80-020(12)(g) (2003)) and the Board's policy administering it (J.A. 61-62) disqualify "any student who is pursuing a degree in theology." Wash. Rev. Code § 28B.119.010(8) (2002). The line drawn by the program between the study of theology and other subjects is plainly based on religion; as petitioners

[2] Justice Brennan separately concluded that the clergy-disqualification violated the neutrality command of the Establishment Clause as well. 435 U.S. at 636-642. As he explained, "the exclusion manifests patent hostility toward, not neutrality respecting, religion; forces or influences a minister or priest to abandon his ministry as the price of public office; and, in sum, has a primary effect which inhibits religion." *Id.* at 636; see *id.* at 639. The disqualification provision in this case likewise may force or influence financially needy students to abandon their training in religion as the price of obtaining a promise scholarship and thus manifests a hostility toward religion. Although the court of appeals did not need to reach that argument in deciding this case, see Pet. App. 31a, the Establishment Clause argument nonetheless was asserted by respondent in the lower courts and in his complaint (J.A. 13-14), and it accordingly provides another ground for affirming the decision below.

emphasize, the disqualification provision applies only to theology taught from a perspective "that inculcates belief (or disbelief) in God." Pet. Br. 5; pp. 3-4, *supra*. Accordingly, under the program, a promise scholar is free to pursue "all manner of instruction," except "religious instruction that inculcates religious belief (or disbelief)." Pet. Br. 43.

So, for example, a promise scholar is free to seek an education in anthropology, computer science, classics, european studies, marine affairs, music, oceanography, pharmacology, psychology, or women studies. See University of Washington, *Colleges, Schools, Departments, and Degree Programs* (modified May 15, 2003) <http://www.washington.edu/home/departments/departments.html.>. In addition, he may study comparative religion from a secular point of view. Pet. Br. 5. But if he elects to study religion from the perspective of those who accept religion as truth or seek to inculcate its values, he is barred from receiving the scholarship. Pet. Br. 43; see Pet. Br. 22-23. That is, if he elects to study the "Bible as truth," rather than as literature, Pet. Br. 10, no scholarship is available. The Washington program therefore not only targets religious subjects in general, it targets religious *viewpoints* in particular. See *Rosenberger*, 515 U.S. at 831; *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 123-125 (2001) (Scalia, J., concurring).

Respondent was deprived of his promise scholarship based on his decision to declare a major in pastoral ministries, in order to prepare to become "a member of the clergy." J.A. 101; see J.A. 43. Preparing to enter the ministry, no less than serving in the ministry, is a religious activity protected by the Free Exercise Clause. See *McDaniel*, 435 U.S. at 626; *Abington Township*, 374 U.S. at 222. Indeed, petitioners themselves acknowledge that "the right to practice religion * * * include[s] pursuing a degree in theology" taught from a religious perspective, Pet. Br. 24, and emphasize that the quintessentially religious nature of

that study is the reason that the State refuses to fund it, see Pet. Br. 5-6, 10. Thus, just like the disqualification provision invalidated in *McDaniel*, the one in this case on its face establishes a "religious classification"—based on "involvement in protected religious activity"—that imposes a "unique disability" on those who meet that classification by disqualifying them from a significant benefit made available to individuals who do not engage in such religious activity. 435 U.S. at 632 (Opinion by Brennan, J.).

Petitioners argue that the promise scholarship program is *neutral*, suggesting that it simply draws a "permissible distinction between secular and religious instruction." Pet. Br. 39-40. That argument is fallacious. The program's disqualification provision is specifically "directed at * * * religious practice"—"because of [its] religious motivation"—and therefore is not neutral. *Lukumi*, 508 U.S. at 533, 577; see *Good News Club*, 533 U.S. at 114. Indeed, the disqualification provision is drawn in terms of the same kind of religious classification that underlay the clergy-disqualification provision in *McDaniel*. Yet, as noted, the law in *McDaniel* is a classic example of "the defect of lack of neutrality" in this context. *Lukumi*, 508 U.S. at 557 (Opinion by Scalia, J.); see *id.* at 523, 533; *Employment Div.*, 494 U.S. at 877.

To be sure, as explained below, some classifications that take into account religion may be unavoidable. In particular, a State may distinguish between secular and religious activities when doing so is necessary to avoid advancing religion in violation of the Establishment Clause and the neutrality commanded by the First Amendment. The State in *McDaniel* unsuccessfully defended its clergy-disqualification provision on the ground that it was necessary to "prevent[] the establishment of a state religion," 435 U.S. at 628, and petitioners here asserted a similar defense below. Pet. App. 25a-28a. But the fact that some religious classifications might prove necessary to comply with the federal

Establishment Clause does not mean that a classification, such as the one at issue in this case, that singles out religious activity for unequal—and disfavored—treatment because of its religious motivation can avoid the strict scrutiny called for by this Court's precedents or, more to the point, that such a law can be labeled as neutral in the first place.

In any event, the promise scholarship program readily fails the closely related requirement of general applicability as well. As the Court explained in *Lukumi*, that requirement embodies the "principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief." 508 U.S. at 543. The promise scholarship program plainly imposes such a burden; as explained, it "is administered so as to disqualify only students who pursue a degree in theology from receiving its benefit." Pet. App. 14a. That type of religion-specific disqualification or disability is the very antithesis of a law of general applicability.

3. Because the promise scholarship program is neither neutral nor generally applicable, it automatically triggers the most searching constitutional review. See *Lukumi*, 508 U.S. at 531-532, 546; *Employment Div.*, 494 U.S. at 886 n.3. The dissent below (Pet. App. 37a-38a) suggested that such strict scrutiny applies only if a law imposes a "substantial burden" (*id.* at 37a) on the exercise of religion. See Pet. Br. 37a-38a. That is incorrect.[3] As the Court emphasized in

[3] The lower courts are divided on this issue. Some courts of appeals have concluded that a facially discriminatory statute does not trigger strict scrutiny unless the plaintiff shows that the challenged classification substantially burdens religious exercise, see *Strout* v. *Albanese*, 178 F.3d 57 (1st Cir.), cert. denied, 528 U.S. 931 (1999); *KDM* v. *Reedsport Sch. Dist.*, 196 F.3d 1046 (9th Cir. 1999), cert. denied, 531 U.S. 1010 (2000), while other courts have held that a law that fails the neutrality or general applicability requirements automatically triggers strict scrutiny, see *Tenafly Eruv Ass'n* v. *Borough of Tenafly*, 309 F.3d 144, 170 (3d Cir. 2002), cert. denied, 123 S. Ct. 2609 (2003); *Hartman* v. *Stone*, 68 F.3d 973, 979 n.4 (6th Cir. 1995); *Peter* v. *Wedl*, 155 F.3d 992 (8th Cir. 1998).

Lukumi, a law that fails either the neutrality or general applicability requirements "must" undergo strict scrutiny. 508 U.S. at 531-532; see *id.* at 546.

Laws that target religion for discriminatory treatment squarely implicate the concerns that led to the ratification of the Free Exercise Clause more than 200 years ago, regardless of how perniciously they inhibit religious activities or beliefs. See *Lukumi*, 508 U.S. at 532; see also *Tenafly Eruv Ass'n* v. *Borough of Tenafly*, 309 F.3d 144, 170 (3d Cir. 2002), cert. denied, 123 S. Ct. 2609 (2003). That is particularly true in the case of laws that *facially* discriminate against religion. Indeed, a law forbidding theology students or Catholics from using the public parks would trigger (and flunk) strict scrutiny, even if going to public parks was in no way material to religious exercise. Moreover, quite apart from the individualized burdens that they may impose on religious exercise or beliefs, laws that contain such facial discrimination evince a hostility toward religion that simply is not tolerated by the First Amendment, absent a showing of the highest constitutional necessity. See Part A, *supra*.

In any event, the religious classification at issue imposes a direct and substantial burden on the exercise of religion by the students it singles out for disfavored treatment. Promise scholarships are made available only to students with special financial needs. See J.A. 50; Wash. Rev. Code § 28B.119.010(1)(b) (2002). Although respondent demonstrated the requisite financial need, because he elected to pursue a degree in pastoral ministries, he was deprived of a promise scholarship worth $1125 for the 1999-2000 year and another potential scholarship of $1542 for the following year. J.A. 45, 95. Although he has continued to pursue his ministry studies, respondent has had to make up the lost scholarship fund by working more than 20 hours a week while attending school. J.A. 48-49, 99-100. The extra time he has

spent working has adversely affected his studies and significantly altered his college experience. J.A. 48-49, 120.

Indeed, this Court has long recognized that, even in the context of programs that do not facially discriminate against religion, the denial of benefits to individuals solely because of their refusal to forgo their religious practices may constitute a substantial burden. For example, in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), a Seventh Day Adventist was denied unemployment benefits after being fired for refusing to work on Saturdays. The Court concluded that by "forc[ing] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work," the government had imposed "the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship." *Id.* at 404. The Court rejected the argument that unemployment benefits were not a right but merely a privilege, explaining that "[i]t is too late in the day to doubt that the liberties of religion * * * may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Ibid.* Applying *Sherbert*'s analysis, the program in this case effectively imposes a $1125 fine on respondent for following what he believes to be his religious calling to prepare for a life in the ministry. J.A. 8-9, 43.

Petitioners state that respondent could have used his promise scholarship to study business management at Northwest and still pursued a theology degree "at *another* school using his own funds." Pet. Br. 25, 38-39 (emphasis added). But, as the court of appeals explained, "[a] state law may not offer a benefit to all * * * but exclude some on the basis of religion." Pet. App. 16a. Promise scholars remain free to pursue double majors, as long as one of their majors is not theology taught from a religious perspective. Requiring promise scholars, such as respondent, who wish to pursue a double major that includes theology to shoulder the added

financial and practical burdens of enrolling in and attempting to integrate themselves into the educational communities of two *separate* colleges is a substantial burden by any measure. Moreover, no separate-school option is available to students who are interested in pursuing only a single, disqualifying religious major.

4. This is not one of the "rare cases" (*Lukumi*, 508 U.S. at 546) in which a law targeting religion for discriminatory treatment survives strict scrutiny. Indeed, petitioners devote their efforts in this Court to arguing that strict scrutiny does not apply and never directly challenge the court of appeals' holding that the program fails such scrutiny. See Pet. App. 25a-31a.

a. This Court has recognized that there is a compelling interest in drawing content-based religious classifications to avoid violation of the Establishment Clause. See *Good News Club*, 533 U.S. at 112-113; *Rosenberger*, 515 U.S. at 837-838. For example, as amici Vermont et al. point out (Br. 17 n.4), some federal statutes that provide *direct* aid to schools specify that such aid may not be made available "for any educational program, activity or service related to sectarian instruction or religious worship." 20 U.S.C. 1062(c)(1). But the Court has indicated that such classifications are necessary to alleviate the "special Establishment Clause dangers [present] when *money* is given to religious schools or entities directly rather than * * * indirectly." *Mitchell*, 530 U.S. at 818-819 (internal quotation marks and citations omitted; emphasis in original).[4]

[4] All but one of the federal statutes cited by amici Vermont et al. (Br. 17-18 & n.4) are part of programs that involve the provision of direct financial aid to schools or other entities and thus are distinguishable from the private-choice program in this case. See 25 U.S.C. 1803(b) (direct grants by the Secretary of the Interior to colleges and universities controlled by Indian tribes may not be "used in connection with religious worship or sectarian instruction"); 20 U.S.C. 1062(c)(1) (direct grants by Secretary of Education to historically black colleges and universities may not be made "for any educational program, activity, or service related to sectarian instruction or religious worship, or provided by a school or department of divinity"); 20 U.S.C. 1066c(c) (loan guarantees for capital improvements to historically black colleges and universities may not be made "for any educational program, activity, or service related to sectarian instruction or religious worship, or provided by a school or department of divinity or to an institution in which a substantial portion of its functions is subsumed in a religious mission"); 20 U.S.C. 1068e(a) (use of appropriated funds "for a school or department of divinity or any religious worship or sectarian activity" is not allowed under programs providing grants to institutions serving economically disadvantaged students or certain other schools); 42 U.S.C. 5001(a)(2) (grants to state agencies and nonprofit groups for volunteer service projects for elderly volunteers may not be used for "projects involving the construction, operation, or maintenance of so much of any facility used or to be used for sectarian instruction or as a place for religious worship"). Congress has recognized the distinction drawn by this Court's decisions between direct and indirect funding. Thus, while States that give federal child care block funds *directly* to entities are barred by federal law from allowing such funds to be used for religious activities, 42 U.S.C. 9858k(a), States that choose to provide *parents* with federally funded certificates for use at the child care provider of their choice are required by federal law to allow parents to choose religious as well as nonreligious providers, 42 U.S.C. 9858n(2). The one statute cited by amici Vermont et al. that does not involve a bar on direct aid to religious programs—25 U.S.C. 3301 *et seq.*—is also distinguishable. That statute provides direct grants to Indian Tribes, which in turn "make grants to individual Indian students." 25 U.S.C. 3303(b)(1). The Tribes are given substantial discretion regarding how to use the funds. See 25 U.S.C. 3303(b). As a result, there is no programmatic guarantee that a Tribe would dispense aid in a neutral manner, and respect for tribal autonomy may counsel against imposing a requirement that a Tribe dispense the aid only as part of a genuinely neutral private choice program.

However, petitioners do not argue that the disqualification provision in this case is necessary to avoid violation of the Establishment Clause, and it plainly is not. Absent the disqualification provision at issue, the promise scholarship program would bear all the hallmarks of the educational assistance programs upheld in *Witters* v. *Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), and *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002). *Witters*, after all,

involved the use of Washington vocational assistance funds made available on neutral terms to an individual who chose to use the funds to study for the ministry at the Inland Empire School of the Bible. 474 U.S. at 483. The promise scholarship program, like the programs in *Witters* and *Zelman*, is designed to promote educational opportunity and scholarship funds may reach schools only as a result of the truly private choices of aid recipients. See Pet. App. 29a-30a.

In the court of appeals, petitioners argued that the State's interest in not violating a provision of its *own* constitution is compelling. See Pet. App. 25a. Petitioners do not appear to renew that argument in this Court, but the court of appeals correctly rejected it. *Id.* at 28a. Even assuming that the Washington constitution would prohibit granting promise scholarships to students that choose to pursue a degree in theology (a debatable point of state law, see *id.* at 26a), the State's interest in complying with that provision would not justify targeting religious activity in a way that otherwise violates the First Amendment of the Federal Constitution. See U.S. Const. Art. VI, Cl. 2; *Widmar* v. *Vincent*, 454 U.S. 263, 275-276 (1981); *McDaniel*, 435 U.S. at 628-629; see also *Good News Club*, 533 U.S. at 107-108 n.2 (potential need to comply with state law would not justify viewpoint discrimination against religious groups).

Widmar involved a challenge to a state university's policy of opening its facilities to student activities except for groups engaged in religious activities. In defending that policy, the State argued "that the State of Missouri has gone further than the Federal Constitution in proscribing indirect state support for religion," and that the university had "a compelling interest in complying with the applicable provisions of the Missouri Constitution." 454 U.S. at 275. The Court declined to decide whether "a state interest, derived from [a State's] own constitution, could *ever* outweigh free speech interests protected by the First Amendment," *id.* at 275-276

(emphasis added), but it made clear that a State's interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution * * * is limited by the Free Exercise Clause and * * * by the Free Speech Clause." *Id.* at 276. In *McDaniel*, the Court similarly rejected Tennessee's effort to defend its clergy-disqualification provision based on the State's own interest in preventing an establishment of religion. 435 U.S. at 628-629.[5]

b. Nor does the disqualification provision advance the legitimate secular objective of the promise scholarship program. To the contrary, the provision *frustrates* that purpose. As petitioner Locke has observed, the promise scholarship program is designed "to provid[e] the best possible educational opportunities for the young people of the state of Washington" and is built on the recognition that "[e]ducation is the great equalizer in our society." J.A. 56; see Wash. Admin. Code § 250-80-010 (2003) ("Purpose. The Washington promise scholarship program recognizes and encourages the aspiration for superior academic achievement of high school students who attend and graduate from Washington high schools."). That ideal is advanced just as readily when a promising high school graduate decides to

[5] The Washington constitutional provision on which petitioners have relied in this case is a "Blaine Amendment" that has its origins not in the type of neutrality toward religion promoted by those like Jefferson and Madison, but in the "pervasive hostility to the Catholic Church and to Catholics in general" that existed in the late 19th century. *Mitchell*, 530 U.S. at 828. Washington was required by Congress to enact a Blaine provision in its constitution by its enabling act. Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676. The record of Washington's constitutional convention indicates that the State's Blaine provision has "a similar original intent and purpose" as the Blaine Amendment. See Robert F. Utter & Edward J. Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 Hastings Const. L.Q. 451, 468 (1988). That history provides all the more reason to reject any reliance on the provision as a means of justifying the discriminatory treatment at issue here.

pursue a college education that will prepare him to enter the ministry as when such a graduate decides to pursue a degree in a field like history, chemistry, or psychology. Cf. *Abington Township*, 374 U.S. at 218 ("Our constitutional policy . . . does not deny the value or the necessity for religious training, teaching or observance."). In either case, the State receives the full secular value of its program, just as it received a full return on the vocational assistance funds that Larry Witters used to prepare for a career in the Christian ministry. See *Witters*, 474 U.S. at 488.

C. The Court's Funding Cases Only Reinforce The Conclusion That The Promise Scholarship Program Impermissibly Singles Out Religion For Disfavored Treatment

Petitioners argue (Br. 20) that this case "falls squarely within th[e] principle" that "the government's decision not to fund the exercise of a fundamental right does not infringe that right." The court of appeals correctly rejected that argument and, instead, analogized the funding program in this case to the one invalidated under the First Amendment's Free Speech Clause in *Rosenberger*.

1. This Court has repeatedly recognized that "[w]ithin broad limits, 'when the Government appropriates public funds to establish a program it is entitled to define the limits of that program.'" *United States* v. *American Library Ass'n*, 123 S. Ct. 2297, 2307-2308 (2003) (plurality) (*ALA*) (quoting *Rust* v. *Sullivan*, 500 U.S. 173, 194 (1991)). Thus, for example, in *Rust* the Court upheld regulations limiting the ability of certain federal funding recipients to engage in abortion counseling as a method of family planning. As the court explained, in crafting social policy, the government is free to choose "to subsidize family planning services which will lead to conception and childbirth, and declin[e] to 'promote and encourage abortion.'" 500 U.S. at 193. In *Maher* v. *Roe*, 432 U.S. 464 (1977), and *Harris* v. *McRae*, 448 U.S. 297 (1980), the Court similarly upheld federal funding restrictions that allowed recipients to use funds for medical services related to childbirth but not for abortions. See also *Regan* v. *Taxation with Representation*, 461 U.S. 540 (1983).

That line of government funding cases, however, does not authorize the sort of religious classification at issue in this case. As this Court itself recognized in *Maher*, one of the primary decisions on which *Rust* is built, see *Rust*, 500 U.S. at 192-194, those funding cases do not control the "significantly different context" in which a funding decision impinges on the "constitutionally imposed 'government obligation of neutrality' originating in the Establishment and Freedom of Religion Clauses of the First Amendment." 432 U.S. at 475 n.8 (distinguishing *Sherbert*, *supra*). Moreover, that understanding is underscored by the cases discussed above, which establish that the "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or *benefits*," *McDaniel*, 435 U.S. at 639 (Opinion by Brennan, J.) (emphasis added), including benefits that come in the form of subsidies. See *Kiryas Joel*, 512 U.S. at 715 (O'Connor, J., concurring in part and concurring in the judgment) ("Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits."); see also *Sherbert*, 374 U.S. at 404-405 & n.6.

When benefits are denied to individuals who otherwise meet a program's eligibility criteria solely because of a *religious* classification, the State is not simply declining to subsidize a constitutional right—a harm that this Court has held insufficient in other contexts. See *Rust*, 500 U.S. at 194-195; *Regan*, 461 U.S. at 549. Rather, the State is singling out religion for "distinctive treatment" (*Lukumi*, 508 U.S. at 534) in a manner that may disrupt the neutrality uniquely commanded by the First Amendment in matters of religion. Indeed, government funding cases like *Rust* emphasize that the State may make "value judgment[s]" about what conduct

it seeks to promote or discourage through the dispensation of public funds. 500 U.S. at 192; see *id.* at 193. But in matters of religion, the First Amendment strictly scrutinizes and disallows any "value judgments" that religion should be explicitly and exclusively disfavored. Thus, although a State may decide to subsidize medical services for the poor for childbirth but not abortion, it may not decide to fund medical services for Catholics, but not atheists.

Nor does this case involve a situation in which the government is funding its own speech and thus has even wider leeway in defining a particular message. See *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 542-543 (2001); *ALA*, 123 S. Ct. at 2309 n.7. The promise scholarship program was established to promote post-secondary educational opportunities for the most promising high school students with financial needs and—save for its disqualification provision—allows for and facilitates the full diversity of private viewpoints present in any robust university system.

2. As the court of appeals recognized, in terms of cases involving challenges to funding programs, *Rosenberger* is the better analogue. Pet. App. 18a-21a. In *Rosenberger*, the Court considered a challenge brought under the Free Speech Clause of the First Amendment to a student activities fund established by a public university, which subsidized a variety of student publications and other extracurricular activities, but withheld funding for student newspapers that promoted a religious message. 515 U.S. at 824. The Court held that the funding restriction violated the First Amendment by singling out "for disfavored treatment those student journalistic efforts with religious editorial viewpoints." *Id.* at 831. In so holding, the Court specifically rejected the university's effort to distinguish the Court's public forum access cases, such as *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), on the ground that *Rosenberger* involved "the provision of funds rather than

access to facilities." 515 U.S. at 832. In addition, the Court rejected the argument that the university's policy was necessary to "obey the Establishment Clause," and, instead, found that "[t]he neutrality commanded of the State by the separate Clauses of the First Amendment was *compromised* by the University's course of action." *Id.* at 845 (emphasis added).

The scholarship program in this case is comparable to the program in *Rosenberger*. The program facilitates a broad spectrum of educational activities and viewpoints undertaken by students, but singles out religious viewpoints for disfavored treatment. In addition, as the court of appeals explained, the educational activities facilitated by the promise scholarship program are rich in expression protected by the Free Speech Clause from the standpoint of both the students who elect particular paths of study and the teachers who engage promise scholars in their selected courses of study. See Pet. App. 20a; *Rosenberger*, 515 U.S. at 836.

If anything, the funding program in this case is more difficult to square with the First Amendment than the one in *Rosenberger*. While the discrimination by the university in *Rosenberger* against the funding of student activities with a religious viewpoint might have been thought necessary in that case because the program involved more direct transmission of funds from the State to religious entities, here the indirect nature of the funding and genuine and independent student choice eliminate any Establishment Clause concerns arguably present in *Rosenberger*.

Like the university in *Rosenberger*, petitioners argue (Br. 44-45) that the Court's forum access cases are not instructive. Here, as in *Rosenberger*, 515 U.S. at 832, that argument should be rejected. There is no more reason under the First Amendment and the basic principles discussed above to allow a State to deny generally available scholarships to theology students than to deny generally available class-

rooms to religious clubs. Although funding programs present additional considerations, the First Amendment is not so idiosyncratic that it forbids a State from opening public school facilities after hours to any users except religious users, but permits a State to open educational opportunities to any promising students except theology students.[6]

D. The First Amendment Leaves States Broad Leeway To Design Programs That May Indirectly Affect Religion But Do Not Single Out Religion For Disfavored Treatment

Petitioners' amici argue that it is important for this Court to leave room for the States to "take diverse paths to religious freedom" and that "States must be granted the opportunity to come to their own conclusions as to how best to achieve religious liberty." Br. for Vermont et al. 20-30. But recognizing—consistent with the First Amendment and this Court's precedents—that the promise scholarship program impermissibly singles out religion for disfavored treatment will not deprive the States of room that the Constitution currently affords them. Moreover, the "play in the joints" between what the Free Exercise Clause requires and what the Establishment Clause forbids does not provide any basis for state action, like the program in this case, that *both* the Free Exercise Clause and Establishment Clause condemn. See Part B and note 2, *supra*.[7]

---

[6] In *Velazquez*, this Court reiterated that, although they "may not be controlling in a strict sense," "limited forum cases" such as *Lamb's Chapel* and *Rosenberger* "do provide some instruction" in cases involving challenges to speech restrictions placed on the receipt of "subsid[ies]." 531 U.S. at 544. That instruction only underscores that the disqualification provision at issue in this case impermissibly discriminates against religious viewpoints in violation of the First Amendment.

[7] In pressing the need for "play in the joints" between the Free Exercise and the Establishment Clauses, petitioners and their amici rely on *Walz* v. *Tax Comm'n*, 397 U.S. 664, 669 (1970). *Walz*, however, involved the government accommodation of religion by granting property tax exemptions to religious organizations for religious properties. The Court in *Walz* stated "there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.* at 669. Government efforts to accommodate religion, such as the tax exemption upheld in *Walz*, advance the principle of neutrality by minimizing government interference and entanglement with religion and thus "follow[] the best of our traditions." *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952). The same thing cannot remotely be said of government action that discriminates against religion.

Nor would finding a First Amendment violation in this case categorically *require* States to subsidize religious instruction. States retain broad leeway to fashion educational assistance programs in any number of ways that do not target religion for disfavored treatment. For example, a State could decide based on a valid secular objective to provide scholarships only to students attending public colleges or universities, and thus avoid having to fund students who attend private schools, including private religious schools. Similarly, a State could choose for a valid secular purpose to fund scholarships for those majoring in specific areas such as agriculture or engineering in which there might be a secular need for additional training. In addition, as discussed above, States may prohibit direct funding of religious entities when necessary to avoid violating the Establishment Clause.

A State may not, however, establish a general assistance program that offers educational opportunities to the most promising students with financial needs, permit them to use the aid to attend any public or private accredited school of their choosing, and then deprive otherwise eligible students of such assistance solely because they elect to pursue a theology education from a religious viewpoint. Such a stigmatizing religious classification is prohibited by the First Amendment and inconsistent with our traditions.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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In The
Supreme Court of the United States

GARY LOCKE, *et al.*,

Petitioners,

v.

JOSHUA DAVEY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE LANDMARK LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Where a State chooses to award scholarships based on neutral criteria to financially needy, academically gifted students, does the State violate the First and Fourteenth Amendments to the U.S. Constitution when it discriminatorily strips the scholarship from an otherwise eligible student for the sole reason that the student declares a major in theology taught from a religious perspective?

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Landmark Legal Foundation is a national public interest law firm committed to preserving the principles of limited government, individual rights – including religious liberty, separation of powers, and free enterprise. Landmark was established in 1976 and maintains offices in Kansas City, Missouri and Herndon, Virginia. Since 1994 Landmark has argued in education reform cases, including *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) and *Jackson v. Benson*, 218 Wis. 2d 835, 578 N.W.2d 602 (1998), that the Free Exercise Clause prohibits discrimination by states in the award of education benefits to students for use in private or public educational institutions.

ARGUMENT

A majority of early Americans were Protestant Christians, and many of the fundamental principles of both the national and state governments were steeped in Protestant theology. With an increasing number of Catholics, Jews and other non-Christian traditions, however, many American cultural conventions were beginning to be called into question following the Civil War. In the public schools, for example, Catholics demanded that their version of the Bible be taught to their children, and many Jews called for the complete removal of religious instruction. In response,

[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *Amicus Curiae* and its counsel, made a contribution to the preparation and submission of this brief.

a movement led by Representative James Blaine of Maine developed to protect the status quo in public education.

Driven by his desire to preserve a Protestant national culture, as well as his ambition to be elected president, Blaine in 1875-76 led an effort to amend the U.S. Constitution to apply the First Amendment to the states and prohibit state governments from, *inter alia*, supporting "sectarian", i.e., Catholic, schools with public funds. See Mark E. DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope and First Amendment Concerns*, 26 Harv. J.L. & Pub. Pol'y 551, 559 (2003). Blaine's proposal was approved by the House of Representatives, but fell short of the required supermajority in the Senate.

The Blaine Amendment's supporters, however, had sufficient congressional strength to attach a provision to the Enabling Act of 1889 requiring certain states, including Washington, to include a Blaine Amendment in their constitutions. The Washington State Constitutional Convention adopted the provision, which in this case is being wrongly relied on by the State as the justification for its refusal to provide Joshua Davey a state-funded scholarship because he has chosen to pursue a degree in theology.

I. THE WASHINGTON STATUTE IMPERMISSIBLY DISCRIMINATES AGAINST RELIGION.

The U.S. Constitution is the supreme law of the land. U.S. Const. Art. VI, Cl. 2. provides that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land; and

> the judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

It is long settled law that a state constitutional provision cannot be used to usurp or displace an individual's federal constitutional rights. See, e.g., *Hunter v. Martin, Devisee of Fairfax*, 14 U.S. 304, 324-25 (1815).

State constitutions can be more protective of individual rights than the federal constitution. See, e.g., *Prune-Yard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980). However, states cannot abridge rights granted by federal law. *Northwest Central Pipeline v. Kansas Corp. Comm.*, 489 U.S. 493, 509 (1989). An asserted state interest in "achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution" is nevertheless limited by the Free Exercise Clause. *Widmar v. Vincent*, 454 U.S. 263, 276 (1981). In order to pass constitutional muster, a law must be generally applicable and neutral with respect to religion. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531-32 (1993). "The minimum requirement of neutrality is that a law not discriminate on its face." *Id.* See *Church on the Rock v. City of Albuquerque*, 84 F. 3d 1273, 1279 (10th Cir. 1996), *cert. denied*, 17 S.Ct. 360 (1996).

Moreover, the protections of the Free Exercise Clause apply when the law at issue discriminates against some or all religious beliefs. *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990). See also *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 148 (1987) where under the Free Exercise Clause, the state may not "impose special disabilities on the basis of religious views or religious status." Where a law denies the benefit to someone on the

basis of his religious exercise, such denial is presumptively unconstitutional. In effect, the denial of the benefit is the equivalent of imposing a fine for engaging in the religious practice. See *Thomas v. Review Bd.*, 450 U.S. 707, 720 (1981); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

The Washington law at issue here provides a state funded benefit known as a Promise Scholarship to students who qualify by virtue of their high school grades, their family income, and their attendance at any accredited Washington college or university. See *Davey v. Locke*, 299 F.3d 748 (9th Cir. 2002). On its face, the Promise Scholarship lacks neutrality regarding religious practice or belief as it specifically prohibits the use of scholarship funds for a theology degree. *Id.* at 753; Wash. Admin. Code § 250-80-020(12). Moreover, as the program is applied by the state, only students majoring in theology taught from a religious perspective are singled out for exclusion from the program. *Davey*, 299 F.3d at 751.

Since the Scholarship Program is not neutral on its face, the Ninth Circuit correctly applied the strict scrutiny analysis to the program. See *id.* The State's defense that the Washington Constitution's Blaine provision required the exclusion of theology majors and therefore constituted a compelling state interest was properly rejected by the Ninth Circuit. *Id.* at 759-60.[2]

[2] Although Petitioners have not asserted the Establishment Clause of the First Amendment to the U.S. Constitution as a defense, a state constitutional provision cannot violate the protection afforded by the federal Free Exercise Clause under the well-settled principles of the Supremacy Clause. U.S. Const. Art. VI.

As a secondary argument, Petitioners argue that the State has no independent obligation to fund Mr. Davey's exercise of a constitutional right. (Petitioner's Brief 22-26.) As the Ninth Circuit correctly noted in rejecting this assertion, however, this Court has held that the government may not deny an individual a benefit because he or she exercises a constitutional right. *Id.* at 755 (citing *Regan v. Taxation Without Representaion*, 461 U.S. 540, 545 (1983). Moreover, as this Court concluded in *Rosenberger v. Rector and Board of Visitors*, 515 U.S. 819 (1995), the government cannot restrict an otherwise generally available benefit on the basis that a qualifying recipient takes his or her religion too seriously.[3]

Finally, Petitioner's assertion that a Promise Scholarship recipient can pursue theological studies by attending two separate institutions or simply by concealing his or her major by delaying a declaration of a major, highlights the failure of the State's defense. Ironically, the Government claims that a student can qualify for a need-based scholarship by incurring greater educational costs. Even more ironic is that the State's argument stands for the proposition that a theology student need only report falsely his or her field of study in order to secure a Promise Scholarship.

[3] Based on the viewpoint discrimination analysis in the *Rosenberger* decision, the Promise Scholarship's singling out of theology majors for disparate treatment is no less constitutionally offensive than a provision specifically prohibiting students from majoring in Women's Studies.

II. *AMICI CURIAE* DISTORT FEDERAL ESTABLISHMENT CLAUSE AND WASHINGTON BLAINE AMENDMENT HISTORY.

While Petitioner does not rely on the Federal Establishment Clause as a defense to its discriminatory Promise Scholarship program, the briefs of *Amici Curiae* National Education Association and American Civil Liberties Union, et al., argue that the federal Establishment Clause provides justification for denying Mr. Davey a Promise Scholarship. In support of their argument, these *Amici* assert wrongly that James Madison's Memorial and Remonstrance Against Religious Assessments embodied Jefferson's "wall" between church and state. Moreover, the ACLU, et al., assert falsely that the Washington State Constitution's religion provisions were an "echo" of the Virginia Act for Establishing Religious Freedom of 1786. (Brief of *Amici Curiae* ACLU, et al., at 15-17.) As set forth below, the historical record demonstrates plainly that both of these assertions are wrong as a matter of historical fact.

In truth, at the time the Virginia Act was adopted, there had been more than a century of commonplace commingling of functions between government at all levels and churches, which continued after the Act's passage. *Amici*'s inference that religion suddenly had been removed from government function is utterly false. The Act simply preserved the status quo without allowing for a general tax designed to support religious institutions. Moreover, when Washington joined the union, religious bigotry against Catholics was so prevalent that the Congress required the adoption of Blaine amendment language as a condition of statehood. See DeForrest, supra, 26 Harv. J.L. & Pub. Pol'y at 574 (2003). The ACLU would have this

Court pretend that Washington State was above such conduct, but the record paints a very different picture.

A. The Founders Never Intended The Establishment Clause To Remove Religion From The Public Square.

Modern day Establishment Clause discussion has been cut off from the Constitution's historical moorings. With the passage of more than 200 years since the Establishment Clause's adoption, it is important to recall the historical context of "establishment" when the Bill of Rights was introduced and Jefferson described the wall of separation between Church and State.

As Chief Justice Rehnquist noted in his dissenting opinion in *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985), "[i]t is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with [Thomas] Jefferson's misleading metaphor for nearly 40 years." Of course, Chief Justice Rehnquist is referring to Jefferson's now infamous letter to the Danbury Baptist Association in which he asserted that "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State." *Id.* at 91-92 (quoting 8 Writings of Thomas Jefferson 113 (H. Washington ed. 1861).) Chief Justice Rehnquist went on to explain that Jefferson's "letter to the Danbury Baptist Association was a short note of courtesy, written 14 years after the Amendments were passed by Congress. He would seem to any detached observer as a less than

ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment." *Id.* at 92. Nonetheless, this Court beginning with *Reynolds v. United States*, 98 U.S. 145 (1879), adopted Jefferson's wall of separation metaphor, and it maintains a presumption of validity in much of current day jurisprudence. *Amici* supporting Petitioner seek to perpetuate this myth at the expense of Mr. Davey's religious freedom. From early colonial days through much of the nation's first century, religion was a fixture in the public square.

Although not every colony began for purely religious purposes, many of the original states had been colonized by religious nonconformists who had suffered in Europe under state churches, such as the Church of England. Yet the practice of establishing churches continued in the new world, so that some of the formerly nonconformist churches, such as the Puritans (later the Congregationalists) in Massachusetts, became some of the established churches in the colonies. See *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 8-10 (1947). Not only did many colonies exact taxes for maintenance of established churches, religious orthodoxy was upheld as well. The punishment and execution of heretics thus continued in Massachusetts, with the expulsion of Roger Williams and Anne Hutchinson in the 1630's and the execution of Mary Dyer and other Quakers in the 1660's. See Edmund S. Morgan, *The Puritan Dilemma: The Story of John Winthrop* 115-33 (1958); Edwin Scott Gaustad, *A Religious History of America* 67-68 (1990); Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B.U.L. Rev. 455, 464 (May 1991). The Quakers found similar treatment at the hands of the Anglicans in Virginia, where a series of anti-Quaker laws passed in the late 1600's criminalized the

refusal of Quakers to baptize their children, prohibited their unlawful assembly, and provided for their execution if they returned after expulsion. Thomas Jefferson, THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON (NOTES ON VIRGINIA) 173 (Adrienne Kock & William Peden eds., Modern Library 1993). Jefferson noted that, "If no capital execution took place here, as did in New England, it was not owing to the moderation of the church, or spirit of the legislature, as may be inferred from the law itself; but to historical circumstances which have not been handed down to us."

A hundred years later, the nonconformists continued to suffer under the established churches. In Virginia, non-Anglican preachers were required to obtain a license from the state. Baptists refused as a matter of principle and over 45 Baptist ministers were jailed for this offense in Virginia between 1765 and 1778. Michael Novak, *On Two Wings: Humble Faith and Common Sense at the American Founding* (2002), at 52. In Connecticut, Congregationalists enjoyed a position of advantage along with the Federalists, so that the union of political and religious interests was known as "the Standing Order." Daniel L. Dreisbach, *Thomas Jefferson and the Wall of Separation Between Church and State* (2002), at 32-33.

> Congregationalists enjoyed many privileges, and dissenters suffered many disabilities, both social and legal, under this regime. Most important, all citizens, Congregationalists and dissenters alike, had to pay taxes for the support of the established church. Civil authorities imposed penalties for failure to attend church on Sunday or to observe public fasts and thanksgivings, and positions of influence in public life were reserved for Congregationalists. Dissenters were often denied

> access to meetinghouses, their clergy were not authorized to perform marriages, and dissenting itinerant preachers faced numerous restrictions and harassment by public officials.

Id. Despite the Toleration Act of 1784, which exempted nonconformists from tax, dissenters such as the Baptists chafed under the remnants of the Standing Order. *Id.* at 33.

With this backdrop of nearly 200 years of taxation, forced expulsion, and even execution of nonconformist Christian sects, the Framers of the Constitution and the Bill of Rights took on the issue of religious establishment.

> It was under a solemn consciousness of the dangers from ecclesiastical ambition, the bigotry of spiritual pride, and the intolerance of sects, thus exemplified in our domestic, as well as in foreign annals, that it was deemed advisable to exclude from the *national government* all power to act upon the subject. The situation, too, of the different states equally proclaimed the policy, as well as the necessity of such an exclusion. In some of the states, episcopalians constituted the predominant sect; in others, presbyterians; in others, congregationalists; in others, quakers; and in others again, there was a close numerical rivalry among contending sects. It was impossible, that there should not arise perpetual strife and perpetual jealousy on the subject of ecclesiastical ascendancy, if the national government were left free to create a religious establishment.

Joseph Story, *Commentaries on the Constitution of the United States,* § 1873 (1833) (emphasis added).

Yet Story also noted the widespread belief during consideration of the First Amendment that Christianity should not be held with indifference by the state, let alone outright antipathy.

> Probably at the time of the adoption of the Constitution, and of the amendment to it now under consideration, the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the State so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.

Id. § 1868.

Furthermore, according to Story:

> Thus, the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions; and the Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, may sit down at the common table of the national councils, without any inquisition into their faith, or mode of worship.

Id. § 1873.

The Establishment Clause, therefore, can best be understood as an agreement among the states that no single church should receive national sponsorship. According to the "sense of justice" of many states, a *state* establishment was beneficent. See Mass. Const. of 1780, Part 1, Art. III; N. H. Const. of 1784, Art. VI; Md. Declaration of

Rights of 1776, Art. XXXIII; R. I. Charter of 1633 (superseded 1842). The purpose behind the Establishment Clause thus was not to stamp out all traces of religion in public life. It defies logic to suggest that after decades of religion so deeply entwined with the states that on one day the Framers decided to stamp out all traces of religion in public life. This misperception, unfortunately, has taken hold among many of America's jurists and historians. And it is this misperception that the NEA and ACLU, et al. want to perpetuate.

James Madison, who was a leader in the House during the debates on the issue, cannot be used as a stand-in for Jefferson's later position. As the Chief Justice noted, "it was James Madison speaking as an advocate of sensible legislative compromise, not as an advocate of incorporating the Virginia Statute of Religious Liberty into the United States Constitution." *Id.* at 97-98. He initially did not even believe that the Bill of Rights were necessary and the language he originally proposed for the Establishment Clause, "nor shall any national religion be established," as the Chief Justice has observed, "obviously does not conform to the 'wall of separation' between church and State idea which latter-day commentators have ascribed to him." *Id.* at 98. It is more likely that Madison "saw the Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of government between religion and irreligion." *Id.*

The actions of the First Congress, contemporaneous with the Bill of Rights, confirm this interpretation of the Establishment Clause. On the same day the House voted on the First Amendment, the House passed the Northwest

Ordinance, 1 Stat. 50, which reenacted the Northwest Ordinance of 1787, and provided that "[religion], morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *Id.* at 52, n. (a).

In addition to their reliance on a selective reading of Madison's Memorial and Remonstrance, the ACLU, et al., and NEA argue that the Founders intended to prohibit the use of governmental tax power to support religious instruction. ACLU Brief, p. 16 (citing Douglas Laycock, *'Nonpreferential' Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L.Rev. 875, 869-99. (1986).) NEA Brief, pp. 18-19 (also citing Laycock, supra.) Each *Amici* takes both Madison and Laycock out of their proper contexts.

As Professor Laycock has argued to this Court previously on the issue of government support of religion:

> If history settles anything in this area, it is that a general assessment would be unconstitutional.
>
> But this case is not about a general assessment; indeed, nothing like the general assessment has been seriously proposed since repeal of the Massachusetts establishment in 1833. In the typical modern dispute about funding religious organizations, the state claims that it is funding some secular function performed by the church; those who object to funding claim that the function is really religious or that the secular function is insufficiently insulated from religious functions. And whether the function to be funded is religious or secular, modern funding programs always include both secular and religious organizations.

Brief of *Amicus Curiae* of Christian Legal Society, 1994 Briefs 329.

The *Amici*'s reliance on Professor Laycock to support the proposition that the founders never intended for government money to go toward the training of ministers misrepresents grossly the professor's argument. Indeed, Professor Laycock later cautioned this Court when considering *Zelman v. Simmons-Harris* that a strict "no funding" rule such as that promoted in this case by *Amici*, "must be narrowly construed to reach only those programs, like the Virginia general assessment, that fund exclusively religious activities because of their religious quality for the purpose of facilitating religious indoctrination." Brief of *Amicus Curiae* of Christian Legal Society, 2000 U.S. Briefs 1751.

B. Washington's Blaine Amendment Was Intended To Preserve The Protestant Status Quo In Public Schools.

More troubling is *Amici* ACLU, et al.'s assertion that the Washington State Constitution's religion provisions prohibiting the use of public funds for sectarian schools is an "echo" of the Virginia Act is utterly false. In truth, the Washington State constitutional convention was "squarely within the common school movement, which maintained that public schools should present wholesome nonsectarian[4] religious influence by teaching about general religious principles." Robert F. Utter & Edward J. Larsen, *Church*

[4] I.e., non-Catholic – see *Mitchell v. Helms*, 530 U.S. 793, 828 (2000).

and State on the Frontier: The History of Establishment Clauses in the Washington State Constitution, 15 Hastings Const. L.Q. 451, 462 (1988). See DeForrest, supra, 26 Harv. J.L. & Pub. Pol'y at 576. Indeed, as Professor DeForrest has reported:

> Despite their ardent desire to preserve public education from the scourge of sectarianism, the Washington State framers did not want to prejudice generic religion in the new state constitution. Like Blaine and those who supported the Blaine Amendment, they believed in robust religious presence in the public square, so long as that religious presence was compatible with broad Protestant devotional sentiment.

Id. at 575. Washington's framers, who were dominated by delegates who supported Blaine for president in 1876, 1880, 1884 and in 1892, were happy to comply with the federal Enabling Act, which conditioned Washington's statehood on the condition that it adopt in its state constitution Blaine's language. *Id.* The result in Washington was "to follow precisely the purpose and intent of the national Blaine Amendment." *Id.* at 576. Upon such an illegitimate legal basis this Court should not overturn the Ninth Circuit's decision below.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 2003

GARY LOCKE, *et al.*, *Petitioners*

v.

JOSHUA DAVEY, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF COMMON GOOD LEGAL DEFENSE FUND AND YOUR CATHOLIC VOICE FOUNDATION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[*]

Amicus Curiae, the Common Good Legal Defense Fund, is a division and outreach of the Common Good Foundation, a not for profit organization dedicated to the conversion of culture. Common Good serves its mission through four pillars of participation: the dignity of all human life, primacy of the family, authentic human freedom and solidarity with the poor.

Amicus Curiae, Your Catholic Voice Foundation is the educational and evangelical outreach of the Your Catholic Voice movement: a movement of faithful Catholic citizens serving the common good. Your Catholic Voice Foundation is dedicated to the social teaching of the Catholic Church and serves its mission through four pillars of participation: the dignity of all human life, primacy of the family, authentic human freedom and solidarity with the poor.

Both are not-for-profit, non-stock corporations recognized as public charities under Section 501(c)(3) of the Internal Revenue Code. As multi-confessional groups serving the common good among all people of faith and good will, *Amici* seek to bring the murky past of the "Blaine Amendments" to light, so that this honorable Court may find them unconstitutional. These Amendments are an impediment to educational freedom, undermine the role of parents as the first teachers of their children, and violate the cherished constitutional protections afforded all Americans.

SUMMARY OF ARGUMENT

When the first wave of Catholic immigrants came to America, they came in an array of ethnic diversity and cultural variety. They also practiced a different form of Christianity than the majority of the American Christian population. As this Catholic minority grew, the Protestant majority responded with isolationism and nativism. Some sought to

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[*] Pursuant to Rule 37.3(a) of the Rules of this Court, *Amici* have obtained and lodged the written consents of all parties to the submission of this *Amici Curiae* brief. Pursuant to Rule 37.6, *Amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person, other than *Amici* and its counsel, made a monetary contribution to the preparation or submission of this brief.

homogenize this growing minority into their idea of a kind of American civil piety. One of the socio-political structures employed was the common (public) school system.

The common schools had developed a predominately Protestant culture which bore seeds of anti-Catholicism and failed to respect the legitimate desires of Catholic parents to keep their children Catholic. Catholics responded by forming their own schools to ensure that their children could live and practice their Catholic Christian faith. This set Catholic schools in competition with the "common school" system.

The Protestant majority reinforced their determination to maintain the "common schools" by denying state aid in any form to institutions they labeled as "sectarian."

Because First Amendment Establishment Clause jurisprudence before the *Everson* decision did not prevent such aid, self-interested politicians sought to create such a burden against Catholics. They proposed so-called "Blaine Amendments" to block any local or state initiatives that might allow such aid.

The discriminatory effects of these Amendments can still be felt today, though many people remain unaware of their tainted past. As in this case, the state denied an educational choice solely on the basis of religion. This denial has far reaching consequences for religious parents who desire to have their values reinforced in the educational experience that takes place outside of the first schoolhouse of the home.

ARGUMENT

I. A PROPER REVIEW OF THIS CASE IS AIDED BY UNDERSTANDING THE SOCIAL HISTORY AT THE TIME THESE AMENDMENTS WERE ENACTED.

A. THE DEMOGRAPHIC FLUX INITIATED BY MASSIVE CATHOLIC IMMIGRATION WAS PERCEIVED AS A THREAT TO PROTESTANT DOMINANCE.

When the Constitution was ratified, the Catholic population was a negligible minority in the United States. At hardly one percent of the national population, they numbered a mere 30,000 at the time of the Revolution.[1] Their numbers grew to 1.6 million by 1850, and that figure doubled in only a decade. After dramatic increases in immigration through 1900, the Catholic population was on its way to reaching twelve million. In comparison, as the Catholic population nearly doubled, the overall population grew by only 59%.[2]

These immigrant groups were mostly poor and lived in the cities. Their marked cultural differences and religious practices, coupled with their exploding population, gave rise to fears in the Protestant majority that their existing civic culture was threatened.[3]

B. THE DISTRUST BETWEEN PROTESTANT AND CATHOLIC GROUPS SURFACED IN THE STRUGGLE FOR INFLUENCE IN THE EDUCATIONAL SYSTEM.

Concurrent with a rising anti-Catholic sentiment was the formation and growth of the common school system. The founders of the common school movement were closely connected to the Protestant majority. Led by men such as Horace Mann, the early common schools used Bible reading, prayer and hymns in their curriculum. At that time, education stripped of all religious content was "simply inconceivable."[4]

While there was little doubt that religion was integral to properly educating children, the only common denominator upon which the mainline Protestant denominations could agree was the reading of Scripture. The teachers used the King James Version of the Bible, a translation not favored by the Catholic Church. They also had children read the Scriptures without proper instruction. This was contrary to Catholic

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[1] John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 299 (2001).
[2] Toby J. Heytens, *School Choice and State Constitutions*, 86 Va. L. Rev. 117, 135 (2000).
[3] Jeffries, *supra* note 1, at 303-304.
[4] *Id.* at 297-299.

teaching and concerned parents given the systemic hostility toward Catholicism present in many of the Protestant groups.[5]

The Protestant majority also agreed that public monies should be withheld from competing "sectarian" (a code term for Catholic) schools, a move to maintain cultural homogeneity and political hegemony.[6] Particularly virulent in this regard were anti-Catholic groups like the Know Nothings and the Ku Klux Klan. However, even those who considered themselves high-minded viewed the Catholic Church as antithetical to the democratic principles that formed the basis of American society.[7] Included in their prejudice was a profound distrust of the patriotism of Catholics based on their commitment to the central authority of the Church hierarchy.[8] Although these fears were entirely groundless and reflected bigotry, ignorance, and inherited suspicions, they were influential.

There was also a lingering stigma attached to the Catholic Church's connections with some monarchies in the Old World and a presumed Catholic indifference to freedom of individual religious conscience.[9] Even as late as the 1950s, Protestants believed that Catholics' ideal Church/State relationship would lead to interdependence reminiscent of the Middle Ages. They feared that this influence would eventually threaten Protestants and other religious faiths.[10] However, it is clear that these fears were wildly disproportionate.[11]

Even so, anti-Catholics within the majority Protestant community perceived that Catholics wanted to usurp their way of life. There was also a growing secular nationalism, which competed with all religions for the

[5] *Id.* at 300.
[6] *Id.* at 282; *see also* Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 Loy. U. Chi. L.J. 121,130 (2001) (noting the intensity of Protestant opposition and the use of the phrase "separation of church and State" serving as code for the unspoken but understood prejudice against the Catholic Church); Richard A. Baer, Jr., *The Supreme Court's Discriminatory Use of the Term "Sectarian"*, 6 J.L. & Pol. 449 (1990) (noting that the Free School Society, founded in New York City in 1805, actively lobbied for a monopoly over the entirety of education tax revenues by referring to Catholic and Baptist schools as "sectarian" and their own schools as "nonsectarian").
[7] Jeffries, *supra* note 1, at 302.
[8] *Id.*
[9] *Id.*
[10] Berg, *supra* note 6, at 133.
[11] *Id.* at 138-140.

hearts of their faithful. Eventually, this led to later educational leaders such as John Dewey advocating instruction of democratic ideals as its own kind of "progressive democratic religion."[12]

C. COMPETING PERSPECTIVES FOUGHT FOR THEIR SHARE OF REPRESENTATION IN THE EDUCATION OF THE NATION'S YOUTH.

The intellectual leadership of the common school movement sought to consolidate their power by advancing a notion of the State as more important than parents in the civic instruction of children. An 1851 article in an education periodical, *The Massachusetts Teacher*, described how immigrant children "must be taught as our own children are taught. We say must be, because in many cases this can only be accomplished by coercion… The children must be gathered up and forced into school, and those who resist or impede this plan, whether parents or priests, must be held accountable and punished."[13]

Similarly, by 1865, the Wisconsin Teachers' Association believed that "children are the property of the state," and a year later the forerunner to today's NEA, the National Teachers' Association, published their policy that "the duties which a citizen owes to the government are prior to any personal or individual claims."[14] The common schools, now the public school system, jealously guarded their educational monopoly to indoctrinate the nation's children. They put their ideology over other crucial social influences, such as the role of parents as first teachers, and the primacy of the family as the first school, first church, first government, first mediating institution and first vital cell of society. Out of this trajectory has grown a hostile form of secularism, which birthed the modern anomaly of interpreting the Establishment Clause (once rightly understood as an *Anti*-establishment Clause) as if in some kind of struggle with the First Amendment's guarantee to individual freedom of conscience embodied in the Free Exercise and Free Speech Clauses.

[12] Jeffries, *supra* note 1, at note 155.
[13] Marvin Olasky, *Breaking Through Blaine's Roadblock*, World, Aug. 24, 2002, *at* http://worldmag.com/world/issue/08-24-02/cover_1.asp.
[14] *Id.*

The Catholic minority did not passively accept the bigotry of this majority approach. Instead they acted upon their deep concerns for their human and civil rights through both political demonstrations and participation at the local level. The Protestant majority turned a deaf ear to this Catholic action. They felt that if Catholics wanted an alternative to the Protestant-run public schools, they would have to find a way to fund their own schools.

Protestants sought to defend the monopoly of the common school system at any cost. Because Catholics were the only group at that time with any number of religiously-affiliated schools, their Protestant and secular opponents viewed any aid to parochial schools as special treatment—amounting to some form of a government subsidy to Catholics and their suspect Church. Ironically, they never considered the future possibility of other, competing schools of religious or secular orientation in the America they knew. They thereby, knowingly or unknowingly, perpetuated anti-Catholic prejudice.[15] These groups also laid the foundation for the obstructions presented by the current efforts to use discriminatory laws against any aid to any religiously affiliated schools, including Protestant schools.

D. CATHOLIC SUCCESSES CREATED CONCERN AMONG THE PROTESTANT MAJORITY THAT MOTIVATED REACTIONS AT HIGHER GOVERNMENTAL LEVELS.

In major cities with large Catholic populations, there was some early success in attempts to garner state support of church schools, such as in New York and Wisconsin, among others.[16] The Protestant majority reacted by relying on their greater number to nullify local Catholic victories. For example, in 1894, after a local effort by Catholics succeeded in New York City, a state constitutional amendment banned all public money from going to church-affiliated schools.[17] Finally, some politicians began to see an opportunity for a constitutional amendment that would take

[15] Berg, *supra* note 6, at 144 (noting that "the separationist view of parochial aid as a 'special privilege,' and public schools as the neutral baseline, retained more that a little of the fear that a divided Protestantism would be overwhelmed by a unified and aggressive Rome").
[16] Heytens, *supra* note 2, at 137.
[17] Jeffries, *supra* note 1, at 301.

this tug-of-war to its ultimate termination, and gain renown for themselves in the process.

II. ATTEMPTED PASSAGE OF THE BLAINE AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. JAMES BLAINE CAPITALIZED ON A NATIONAL TREND OF BIGOTRY FOR HIS OWN POLITICAL PURPOSES.

The scholarly consensus is that from the historical context outlined above came the series of legislative enactments known as the "Blaine Amendments."[18] This body of legislation derives its name from James Blaine (1830-1893), a shrewd and ambitious politician who served in various political positions, and ultimately became Speaker of the U.S. House of Representatives, where he remained from 1869 to 1875.[19]

Blaine left a very questionable legacy. Posterity views him much less warmly than did his contemporaries. At his death in 1893, Chauncey Depew declared "his name will rank with Lincoln's," but only 40 years later, his biographer Charles Russell concluded, "No man in our annals has filled so large a space and left it so empty."[20] His family background complicated his political hopes. His father came from a loosely Presbyterian background and his mother from a Catholic one; however, they raised him as a secularist.[21] Fearing the potential for his opponents to question his familial ties to Catholicism, Blaine sought to find a way to distance himself from the Catholic Church and capitalize on the endemic anti-Catholic surge in national politics for his own gain.

He found his chance in the Republican Party of the time, a sickly organization after plagues of corruption and regional fragmentation had eroded its base of support. Because they held mostly narrow and reactionary views, the party was losing power and sought a new agenda

[18] *See* Heytens, *supra* note 2, at 138.
[19] *See for a brief career biography* http://www.blaineamendments.org/Intro/JGB.html.
[20] Olasky, *supra* note 13.
[21] *Id.*

around which to rally support.[22] The issue they settled upon was the Catholic "threat." They continued to alienate Catholics and Southerners, (who were already mostly Democrats), in order to gain the support of Northern Protestants and activate them to vote on a single issue. The Republican President at the time, Ulysses S. Grant, harbored strong anti-Catholic beliefs that were furthered by his poor familiarity with Scripture and his ignorance of Church history. He once publicly proclaimed that Catholicism was connected with "superstition, ambition, and ignorance."[23]

In the midst of this vacuum and turmoil, James Blaine saw his opportunity for prominence. He came to believe that he had potential as a Presidential candidate on the Republican ticket and did indeed become his party's nominee in 1884, but his candidacy was unsuccessful. During his campaign, a member of his staff referred to the Democratic Party as the party of "Rum, Romanism, and Rebellion," a statement Blaine refused to deny.[24]

Blaine was an aggressive force in Congress as House Speaker and exerted that force effectively. Even so, some of his peers chafed at his often-overbearing control.[25] In order to ascend to prominence, he had to find a cause to launch him into the popular political stage of the day. He did this by using his strong presence as House Speaker to propose a new Amendment to the United States Constitution that would deny any form of aid to all "sectarian" schools.[26]

B. THE BLAINE AMENDMENT USED A TREND OF BIGOTED POLITICAL SUBTEXT TO CREATE A PRECEDENT OF DISCRIMINATORY LANGUAGE

[22] *Id. Cf.* Heytens, *supra* note 2, at 132.
[23] Olasky, *supra* note 13.
[24] *Id.*
[25] Heytens, *supra* note 2, at note 78 (In a 1876 debate, another Congressman exclaimed, "I want to know whether this is the American Congress, or a school in which we are merely pupils of the school-master from Maine!").
[26] *Id.* at 132. The text of the Amendment read:

> No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor nor any public lands devoted thereto, shall ever be under the control of any religions sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

THAT HAS PLAGUED OUR COUNTRY TO THE PRESENT DAY.

The use of the term "sectarian" within the context of Blaine's Constitutional Amendment was no coincidence, as it was a well-understood code word for "Catholic" within the socio-political language of the time.[27] Over the next century, this code word continued to be used in political parlance. Though used by the United States Supreme Court in its opinions since *Everson*, by then the term was expanded to include any group with unpopular beliefs that the mainstream majority wished to sideline.[28] By the 1930s, secularists had consigned to an outcast status a growing number of devout Christians—Protestant, Orthodox, and Catholic. One extreme example of this is evidenced by statements from personalities such as Paul Blanshard and other signatories of the Secularist "Humanist Manifesto".[29] Even the catchphrase "separation of church and state" was a code term, often used early on in anti-Catholic diatribes before its resurgence in the 1940s in the move toward the current confused Church/State jurisprudence.[30]

C. THE FAILURE OF THE BLAINE AMENDMENT AT THE NATIONAL LEVEL ILLUSTRATED ITS DIVISIVE AND INVIDIOUS PURPOSE.

The events surrounding the history of this Amendment demonstrate that its roots were sunk deep in both a politically motivated opportunism and a discriminatory animus. There was no debate on the substantive merits of the proposed Amendment before it passed the House

[27] *See supra* note 5.
[28] Baer, *supra* note 6, at 451 (explaining "Just as ruling elites have used racial and sexual epithets to put down blacks and women, so they have used 'sectarian' to exclude and marginalize those individuals and groups whose religious or philosophical beliefs or social practices did not correspond to their own vision of what was appropriate in the cultural marketplace").
[29] Jeffries, *supra* note 1, at note 155. ("We have an obligation to expose and attack the world of religious miracles, magic, Bible-worship, salvationism, heaven, hell, and all the mythical deities. We should [specifically attack] such quack millenialists as Bill Graham and such embattled reactionaries as [the pope] because they represent the two greatest humanist aggregates in our society.")
[30] Berg, *supra* note 6, at 130.

by a 180-7 majority, and 98 Congressmen abstained from the vote when it was taken.[31]

After referral to the Senate Judiciary Committee, which added a clause ensuring that the Bible would still be read in public schools, the Senate debated the Amendment in light of their concerns over federalism.[32] Many members were skeptical of the Amendment's overreaching federal interference at the state and local level. The final Senate tally was 28 in favor, 16 opposed, and 27 in abstention. The vote fell along party lines, with all but one Republican favoring its passage, and the entirety of the Democratic members opposed to it.[33] It fell four votes short of the required supermajority necessary for a Constitutional amendment.

The fledgling political magazine, *The Nation*, supported the Amendment's passage, but foresaw its failure and lamented Blaine's indifference: "All that Mr. Blaine means to do or can do with his amendment is, not to pass it but to use it in the campaign to catch anti-Catholic votes."[34] Senator William Wallace Eaton remarked on its politically motivated purpose, that "It was one of [Blaine's] dodges to get a nomination."[35]

However, Blaine himself saw the Amendment as a necessity to correct a "constitutional defect." He published an open letter in the *New York Times* in which he argued that it was required because the Establishment Clause of the First Amendment existed solely to preclude the United States Congress from establishing a particular state church, and that without the Amendment the states were "left free to do as they pleased."[36] This option was inconceivable to him.

With the failure of the federal Blaine Amendment, the anti-Catholic faction in Congress sought other methods to suit their divisive

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[31] Heytens, *supra* note 2, at 132-33.
[32] *Id.* at 133. The Judiciary Committee's added clause was "This article shall not be construed to prohibit the reading of the Bible in any school…"
[33] *Id* at 133-34.
[34] Olasky, *supra* note 13.
[35] *Id.*
[36] Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 Yale L. & Pol'y Rev. 113, 145 (1996).

political ends. They took advantage of their simple majority in both houses of Congress to achieve the failed Amendment's purpose. By 1890, due largely to their efforts, twenty-nine out of forty-five states in the Union placed prohibitions in their state constitutions against the use of public funds to aid "sectarian" schools. Many of these, such as Washington, were new states whose admission to the Union was predicated on their acceptance of such a Blaine Amendment.[37] Congress in 1899 passed an enabling act that divided the Dakotas, North and South, and allowed Washington, Montana, and the Dakotas to become states and form constitutions—but only if they accepted language into their state constitutions almost identical to the failed Federal Blaine Amendment.[38] The citizens in these states were denied the choice given to other states that had democratically passed Blaine provisions or those that have subsequently reinforced them by statute.

Because of the diverse nature and circumstances of the Blaine Amendments' enactments, there is a difference in severity of enforcement and a great inconsistency of interpretation. By forcing these Blaine Amendments on some states, anti-Catholic factions disenfranchised and discriminated against a growing minority that were perceived as a threat to an existing political hegemony. The lasting discriminatory effects of such Blaine Amendments are still felt today by students such as Mr. Davey.

III. DISCRIMINATION BY STATE BLAINE AMENDMENTS ACCOMPLISHES THE BIGOTRY OF THE FAILED NATIONAL BLAINE AMENDMENT.

In particular cases like Washington, state courts have used Blaine Amendments to impose more stringent restrictions on aid to religious schools than has the United States Supreme Court. This Court's decisions since *Everson* have allowed aid to be distributed on a religiously neutral basis notwithstanding its discomfort with any direct public assistance to such schools.[39] Despite great similarities in the language of Blaine Amendments between states (most were worded after the failed Constitutional Amendment), there is great disparity in their application from state to state. As evidenced by the Washington Higher Education

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[37] Jeffries, *supra* note 1, at 305.
[38] Viteritti, *supra* note 36, at 146.
[39] *Id.* at 149-50. *See also* Witters v. State Commission for the Blind, 771 P.2d 1119 (1989).

Coordinating Board's administration of the Promise Scholarship, there is an often arbitrary and uneven application within the same state. In so doing they have violated the constitutionally protected rights to the Free Exercise of Religion by substituting their own standards. This approach does not pass constitutional muster and raises serious Supremacy Clause conflict issues.[40]

A. WASHINGTON'S DISCRIMINATORY PRACTICE REFLECTS THE UNCONSTITUTIONALITY AND GENERAL OFFENSIVE NATURE OF BLAINE AMENDMENTS.

Washington's case law reveals a sorry history of religious discrimination beyond even the broader national trend discussed so far. In 1943, Washington's legislature enacted a provision for universal transportation of schoolchildren that was struck down on Establishment Clause grounds. Two years after the 1947 *Everson* decision, in which this Court upheld such a program, a Washington court once again struck down a public busing program for children who attended parochial schools.[41] The Washington State Supreme Court's decision there was at odds with this Court's precedent, and took issue with the entire line of reasoning on the neutrality of such indirect aid.

Later, in *Weiss v. Bruno*[42] and *Witters v. State Commission for the Blind*,[43] the Washington Supreme Court saw no line of distinction between direct and indirect aid, and what is worse, refused to consider any infringement upon the Free Exercise interest in these cases.[44] The Petitioner in the instant case refers liberally to the *Witters* decision without mention of its obstinate refusal to accept the reasoning of the United States Supreme Court. Indirect aid to a citizen should not be denied simply on the basis of that citizen's religion or course of study.

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[40] Viteritti, *supra* note 36, at 160. "Diversity is expected under our system of judicial federalism. It is problematic, however, when State courts impose limitations on the free exercise of religion that transgress constitutional guidelines set down by the Court. Our system of federalism permits States to define State rights more broadly than analogous federal rights but not to abridge those liberties that are protected by the Constitution."
[41] *Id.* at 152-53.
[42] 509 P. 973 (Wash. 1973).
[43] 771 P.2d 1119 (Wash. 1989).
[44] Viteritti, *supra* note 36, at 153.

In *Garnett v. Renton Sch. Dist. No. 403*, the Ninth Circuit's federal authority prevailed over Washington's discriminatory interpretation of Establishment doctrine.[45] The court declared "Many States have establishment clauses that are more restrictive than the federal establishment clause," but even so, "State constitutions can be more protective of individual rights than the federal Constitution…however, states cannot abridge rights granted by federal law."[46] The instant case epitomizes the abuse that proceeds from such abridgement.

In denying Mr. Davey access to state aid, the State relies upon the Washington State Constitution's establishment clause (Blaine Amendment). However, this very denial violates the Free Exercise and Equal Protection clauses of the United States Constitution. Furthermore, it violates his basic human rights which, in the words of the Founders, are "inalienable."

IV. THE DISCRIMINATION ENDEMIC IN THE BLAINE AMENDMENTS VIOLATES THE UNITED STATES CONSTITUTION'S GUARANTEES OF INDIVIDUAL FREEDOM.

Petitioners have failed to show that their Blaine Amendment survives strict scrutiny by protecting a compelling state interest. It is certainly not narrowly tailored. As one scholar has pointed out, the very difference between Blaine Amendments and the Establishment Clause in the First Amendment is their divergently overbroad standard of what constitutes establishment, and for that reason, "the Blaine Amendments are, by definition, overinclusive because they go further than is necessary to comply with the Establishment Clause's self-executing dictates."[47] State courts have shown their lack of willingness to strictly construe this anachronistic law, favoring instead to engage in an arbitrary and unequal enforcement. Washington's Blaine Amendment should be struck down as unconstitutional. It is overly broad in its application, tramples free exercise, free speech and free association, and continues a sordid legacy of discrimination and bigotry when so much of this sad segment of the past has been rightly purged from American society.

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[45] 987 F.2d 641 (9th Cir. 1993).
[46] *Id.* at 646.
[47] Heytens, *supra* note 2, at 150-51.

A. IN ITS OVERZEALOUS PROTECTION OF A POORLY DEFINED STATE INTEREST, THE BLAINE AMENDMENT VIOLATES FREE EXERCISE.

The two clauses of the First Amendment pertaining to religion exist in a balance of interests. Sometimes this balance is oversimplified or skewed so as to favor one interest at the expense and detriment of the other. When any such conflict looms, the individual liberty interest protected by the Free Exercise Clause should govern over the more ethereal threats to Establishment Clause state interests.[48] Professor Laurence Tribe explained the relationship:

> Whenever both religion clauses are potentially relevant...the dominance of the free exercise clause follows from the principles underlying both clauses....In the context of these general values, we must consider whether a nation committed to religious pluralism must, in the age of the affirmative state, make active provision for maximum diversity; we must ask whether, in the present age, religious tolerance must cease to be simply a negative principle and must become a positive commitment that encourages the flourishing of conscience...it seems doubtful that sacrificing religious freedom on the altar of anti-establishment would do justice to the hopes of the Framers.[49]

In the instant case, Washington's discretionary prerogative to extend their state establishment clause well beyond the scope of the First Amendment grossly interferes with the federally-protected Free Exercise Clause and should be stricken as discriminatory and unconstitutional.

B. THE BLAINE AMENDMENTS VIOLATE THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE BY SELECTIVELY DENYING CITIZENS' EQUAL ACCESS TO GOVERNMENT PROTECTION AND PROGRAMS BASED ON A SUSPECT CLASSIFICATION.

With regard to the Equal Protection Clause of the Federal Constitution, Washington's discriminatory Blaine Amendment and its statutory progeny (in addition to other states with similarly discriminatory Blaine Amendments) are subject to strict scrutiny because they discriminate based upon religious distinctions.[50] The Blaine Amendment discrimination is two-fold.[51] Their initial discriminatory purpose was a product of anti-Catholic animus. Also, most of the Blaine Amendments use patent distinctions based on religion, making them facially discriminatory in their classifications. Whether or not a private school is allowed state aid is determined by which religious affiliation, if any, it possesses.

1. BLAINE AMENDMENTS WERE ORIGINALLY DISCRIMINATORY IN THEIR PURPOSE, AND THAT LEGACY CONTINUES IN THE PRESENT CASE.

In *Hunter v. Underwood*,[52] this Court struck down a law that denied voting access to any person convicted of crimes of moral turpitude. Its original enactment discriminated *de facto* based upon race, another suspect classification, even though it could conceivably serve a state interest if currently enacted as written.[53] By the same reasoning, a review of Blaine Amendments should not overlook the original blemish of discrimination that spawned their initial passage, nor spare condemnation simply because of the passage of a century. The original purpose, as well as the enduring legacy of the Blaine Amendments, is discrimination based on the suspect classification of religion that also infringes upon the individual guarantee of free exercise of personal conscience, all in the name of suppressing a religious minority.

2. THE BLAINE AMENDMENTS ARE FACIALLY DISCRIMINATORY BECAUSE THEY DIFFERENTIATE AND EXCLUDE ON THE BASIS OF RELIGION.

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[48] Joseph P. Viteritti, *supra* note 36, at 142 (pointing out, "Like the remainder of the Bill of Rights, this jurisprudence is concerned with the primacy of the individual...For the Court to reverse this priority is like the hen who protects the nest but loses the egg.")
[49] *Id.* (quoting Laurence H. Tribe, *American Constitutional Law*, 1204 (2d ed. 1988)).
[50] Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 546 (1993).
[51] Viteritti, *supra* note 36, at 145-46.
[52] 471 U.S. 222 (1985).
[53] Heytens, *supra* note 2, at 147 (noting that "Passage of time, standing alone, is insufficient to purge the taint of an originally invidious purpose").

The pertinent articles that stain the Washington Constitution with anti-Catholic and, more generally now, anti-religious bigotry, are Article I, Section 11 and Article IX, Section 4. Art. I, § 11 declares, in part, "No public money or property shall be appropriated for or applied to any *religious* worship, exercise *or instruction*, or the support of any religious establishment."[54] Art. IX, § 4 goes further, "All schools maintained or supported wholly or in part by the public funds shall be forever free from *sectarian* control or influence."[55]

The provision in Article I is arguably more neutral; however, as this Court held in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*,[56] "Facial neutrality is not determinative...The Free Exercise Clause protects against governmental hostility which is masked as well as overt." Though the wording of art. I § 11 appears neutral, its interpretation by courts has been overbroad and arbitrary. As noted above, state courts and administrations such as the HECB have failed to notice or recognize any distinction between direct state aid to a religious institution, and an indirect scholarship awarded to a student who selects an accredited college program with a religious affiliation. It is unfair for Petitioners to confuse career training at an institution of higher learning with Sunday school. As a result of this unfair application, Washington has denied a needy student access to state aid and services based on his choice of education and vocational calling.

The very use of the word "sectarian" in art. IX, § 4 should raise an alarm. It is a remnant of discriminatory language used to suppress minorities over the last century. As such, it is facially discriminatory. It excludes participation solely on the grounds of religious conviction and deeply held religious belief. It is subject to strict scrutiny, for as this Court has held, "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral...and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest."[57]

[54] *Emphasis added.*
[55] *Emphasis added.*
[56] 508 U.S. 520, 534 (1993).
[57] *Id.* at 533.

The results of variant applications of such amendments show these discriminatory effects even more than a cursory reading of the amendments' language.[58] RCW 28B.10.814 (entitled "Theology student denied aid") details, "No aid shall be awarded to any student who is pursuing a degree in theology." It is curious that Washington lawmakers see no irony in the fact that this statute immediately follows RCW 28B.10.812, which states, "All student financial aid shall be granted by the commission without regard to the applicant's race, creed, color, *religion*, sex, or ancestry."[59] By excluding Mr. Davey from state funds, to which he would otherwise be fully eligible, on the mere basis of his desired major in Theology, the State is unfairly denying him the guarantees of the Equal Protection Clause.

3. UNDER *ROMER V. EVANS*, THE METHODOLOGY OF THE BLAINE AMENDMENTS' ENACTMENT VIOLATES THE EQUAL PROTECTION RIGHTS OF A CLASS OF CITIZENS.

This Court recently struck down a state constitutional amendment under a rationale fully applicable to the Blaine Amendments. In *Romer v. Evans*, the majority of citizens in Colorado had approved a statewide provision that this Court held would have curtailed the local efforts of a minority group, denying them equal protection under the law.[60] For these interested minorities to regain their access to government protection and services, this Court observed, they would have to change Colorado's Constitution, an essentially unlikely prospect considering their overall numerical minority. *A fortiori*, Blaine Amendments, which have had a discriminatory effect upon those claiming access to equal educational opportunities based upon religion, and which are explicit in their discriminatory classifications, violate the Constitution.

CONCLUSION

People of faith in America are now experiencing the consequences of the injustice and errors of past discrimination. Many of the old prejudices are now rightly displaced. However, issues such as the right of

[58] *Id.* at 535 (noting "Apart from the text, the effect of a law in its real operation is strong evidence of its object").
[59] *Emphasis added.*
[60] 517 U.S. 620, 626-27 (1996).

parents to choose where to send their children to school or what majors to study reach far beyond the climate of hostility toward one religious group that fostered the Blaine Amendments. Ironically, some religious people whose very ancestors may have supported such efforts are now themselves the subject of their discriminatory impact. The public schools are certainly no longer reflective of even mainline Protestantism. Private schools, religious schools, and charter schools now boast a diverse selection of choices that reach across economic, cultural, religious, and racial strata.[61]

The discriminatory shadow cast by these Amendments now affects Catholics, Orthodox Jews, Evangelical Protestants, Muslims, and others that form the religious tapestry that is the American experience.[62] Indeed, some of the most salient voices on this issue are African-Americans, who increasingly favor Parental Choice initiatives in education and recognize this as an emerging issue of social justice.[63] Parents of every race, creed and color seek to extend their educational mission as the first teachers of their children through choice from among a wide array of schooling options.

The majority of citizens support the accommodation and tolerance of religion, recognizing that religious persons and institutions play a vital role in society and promote the common good.[64] As Professor John Jeffries Jr. has written concerning the Blaine amendments, "the right response is not refinement but repudiation."[65] The time has come to put Blaine—and a century of discrimination—wholly behind us once and for all. The treatment of Mr. Davey is repugnant to the legacy of authentic freedom protected by the Constitution of the United States of America.

[61] Jeffries, *supra* note 1, at 366.
[62] *Id.* at 359.
[63] *Id.* at 361.
[64] *Id.* at 365.
[65] *Id.* at 370.

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No. 02-1315

In the
Supreme Court of the United States

GARY LOCKE,
Governor,
State of Washington,
Petitioner,

v.

JOSHUA DAVEY,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATE OF ALABAMA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does a State violate the first and fourteenth amendments to the United States Constitution when it refuses to award a state-funded scholarship to an otherwise eligible student for the sole reason that the student intends to major in theology?

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INTEREST OF AMICUS CURIAE

The State of Alabama, long a vocal proponent of federalism as a bedrock feature of the United States Constitution, has a strong interest in ensuring that principles of federalism are not distorted to justify state-sponsored religious discrimination. Simply put, states' rights do not trump fundamental, constitutionally grounded individual rights. Indeed, in recent years, the State of Alabama has assiduously avoided the moniker "states' rights" to define the principles of federalism that it has sought to vindicate in cases before this Court. Not only does the phrase evoke memories of a regrettable and all-too-recent era of invidious state-sponsored discrimination, it fundamentally misconceives the purpose of federalism.

Federalism is not designed to aggrandize the power of the States but to promote individual liberty, by dividing and checking power among the state and federal governments. Invoking principles of federalism to defend a practice of state-sponsored religious discrimination is not just ironic in its parallel to erstwhile Southern anti-civil rights rhetoric, it is antithetical to the core purposes of the first, tenth, and fourteenth amendments. A State has no constitutional obligation to set up a scholarship program in the first instance, but, having chosen to do so, the State has a constitutional obligation not to exclude citizens from the program on the basis of their religious choices. The State of Alabama submits this brief to urge that principles of federalism not be used as cover for religious discrimination, a constitutional transgression of which Alabama has been guilty as well.

SUMMARY OF ARGUMENT

The issue in this case is whether the State of Washington may exclude respondent Joshua Davey from its Promise Scholarship program because Mr. Davey intends to major in theology. Petitioner Gary Locke, Governor of the State of Washington, asserts that principles of federalism permit such governmental discrimination and that the State has a compelling interest in securing the wall of separation between church and state. Petitioner and the amici who back him are wrong, for at least two reasons.

First, it should be axiomatic that federalism principles do not permit States to violate the rights secured to their citizens by the United States Constitution. As Mr. Davey and the amici States of Texas et al. have articulated in their briefs, Mr. Davey has a fundamental constitutional right to be free from governmental discrimination on the basis of his religious choice. By excluding him from the Promise Scholarship program, the State of Washington has discriminated against religion. It has exited the constitutional safe haven of "benevolent neutrality" toward religion, *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970), and has entered the forbidden territory of overt discrimination against religion. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) ("the minimum requirement of neutrality is that a law not discriminate on its face"); *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990); *Larson v. Valente*, 456 U.S. 228, 244-46 (1982). The State may not justify this discrimination by vague invocation of federalism "concerns" and loose sloganeering about the maintaining the "wall" of separation between church and state.

Second, the Washington statute that singles theology majors out for discriminatory treatment has its roots in a state constitutional provision — the infamous Blaine amendment — whose purpose was demonstrably discriminatory and specifically anti-Roman Catholic. Washington and many other States, including Alabama, adopted these Blaine provisions in the latter half of the nineteenth century as part of a concerted movement to dilute the attractiveness and effectiveness of Catholic education. This ignoble heritage renders these provisions a suspect rationale, to say the least, for a modern-day policy of excluding religious majors from a general scholarship program. An analysis of the history of Alabama's own Blaine provision confirms that its purpose was not to further the religious freedom of its citizens but to stifle the spread of Roman Catholic religious beliefs within the State.

The State of Alabama does not take this position lightly. Like Washington, Alabama has never expressly repealed its Blaine provision. In 1978, Alabama enacted a student grant program that purports to discriminate on the basis of religious study, just as the Washington Promise Scholarship program does. Like the Promise Scholarship program, Alabama's student grant program limited participation to students who are "not enrolled and do[] not intend to enroll in a course of study leading to an undergraduate degree in theology or divinity." Ala. Code § 16-33A-1(4)(f) (1975). Other Alabama education statutes and regulations similarly have purported to exclude religious participants.

Fortunately, the need for a federal constitutional challenge to Alabama's Blaine provision and to its discriminatory scholarship programs was mooted in

1999. That year, Alabama enacted the Alabama Religious Freedom Amendment (ARFA) to its Constitution. ARFA made clear not only that the State could not discriminate openly against religion, as already forbidden by the free exercise clause of the first amendment, but that the State could not burden the religious exercise of its citizens, even with laws of general applicability, unless it had a compelling government interest to do so and had employed the least restrictive means of furthering that interest. It is the view of the Attorney General of Alabama that ARFA invalidated the Blaine provision of the Alabama Constitution to the extent that it required or permitted the discriminatory distribution of state educational funds.

In all events, with or without ARFA, Alabama would now concede that its Blaine provision and its discriminatory scholarship programs violate the first and fourteenth amendments. The Washington Promise Scholarship program does also. Exclusion of religious participants from public education programs is the relic of a myopic and bigoted era. It should not be tolerated in the name of federalism or any other structural constitutional principle.

ARGUMENT

I. The States May Not Invoke Principles of Federalism to Justify Overt Discrimination Against Religion.

Principles of federalism require proper respect for "the constitutional role of the States as sovereign entities." *Alden v. Maine*, 527 U.S. 706, 713 (1999). But the sovereign powers of the States have obvious constitutional limits. Proper respect for the sovereign powers of the States requires consideration of the

objectives underlying the division of the powers of government between state and federal sovereigns in the United States Constitution.

In Federalist Number 51, James Madison describes the principle of "double security" incorporated into the United States Constitution:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the right of the people. The different governments will control each other, at the same time that each will be controlled by itself.

Federalist No. 51, pp. 350-51 (J. Cooke ed. 1961).

To safeguard individual liberties, the powers of government are first divided, then twice checked. The power of the federal government is limited to the specific grants of authority given to it by the people through their Constitution. Any powers of government not specifically granted to the federal government are reserved to the States. States are free to govern themselves within the boundaries established by the lawful acts of the federal government and the constitutional principles applied to the States through the fourteenth amendment. The supremacy clause commands that, to the extent state law conflicts with federal law, federal law controls.

To ensure that each government operates within its proper sphere and in accordance with overarching constitutional principles, the Constitution imposes dual checks upon both state and federal powers. The recent federalism decisions of this Court demonstrate the

critical function that it performs in Madison's "double security" scheme. To check the unauthorized use of federal power, the Court acts to restrict federal laws to those authorized by the Constitution. *See, e.g., United States v. Morrison*, 529 U.S. 598 (2000) (holding that Congress lacked the authority, under the commerce clause, to provide a civil remedy for sexual assault in the Violence Against Women Act); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that Congress lacked the authority, under section five of the fourteenth amendment, to impose the Religious Freedom Restoration Act on the States).

The Court also requires a clear statement of congressional intent "to alter the 'usual constitutional balance between the States and the Federal Government.'" *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)). "[T]he clear statement principle reflects 'an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.'" *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, 544 (2002) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991)). In interpreting the scope of federal law, this Court is careful to interpret statutes so as not to effect "substantial change in the balance of federalism unless that is the manifest purpose of the legislation." *Owasso Independent School Dist. No. I-011 v. Falvo*, 534 U.S. 426, 432 (2002).

The States have a critical role also to test the limits of federal legislative and regulatory power through appropriate channels of litigation. *E.g., Garrett v. Univ. of Alabama at Birmingham Bd. of Trustees*, 531 U.S. 356 (2001) (holding that Congress did not validly

use its remedial power, under the fourteenth amendment, to subject the States to claims for money damages under the Americans with Disabilities Act); *Alexander v. Sandoval*, 532 U.S. 275 (2001) (holding that in enacting Title VI, which prohibits intentional discrimination against members of suspect classes, Congress did not create a private right to enforce disparate impact regulations promulgated by federal agencies through litigation against the states).

In turn, the States' exercise of power is checked by people like respondent Joshua Davey, who bring lawsuits in federal courts to resist state encroachment on individual liberty. The courts act to ensure that the States operate within their proper sphere of power and without violating federal rights. In this manner, the American people, though their Constitution, have divided and checked the powers of government, creating "a government of laws and not of men."

Consistent with the division of state and federal powers, federalism dictates that "each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1523 (2003). This Court ensures, however, that the States' judgment is exercised according to overarching principles of federal constitutional law. *See, e.g., Rinaldi v. Yeager*, 384 U.S. 305 (1966) (holding that a state statute that imposed certain court costs on indigents defendants who are imprisoned but not on those who were not imprisoned violated the equal protection clause). Although States have some discretion to decide what activities they will and will not fund, that discretion is constitutionally bounded. For example, States may not provide funding to private schools so as to assist in maintaining a separate and

discriminatory school system. *Norwood v. Harrison*, 413 U.S. 455 (1973) (invalidating Mississippi textbook program that "significantly aided organization and continuation of separate system of private schools which might discriminate if they so desired").

With regard to the establishment clause, "it may well be that state action should be evaluated on different terms than similar action by the Federal Government." *Zelman v. Simmons-Harris*, 536 U.S. 639, 678-79 (2002). Sound federalism principles may compel some "play in the joints" between what the establishment clause requires and what it permits. *Norwood*, 413 U.S. at 469. Ordinarily, that "play in the joints" will favor religious freedom, however, in view of the pro-religion purposes of both the free exercise and establishment clauses. *See, e.g., Walz v. Tax Comm'n of City of New York*, 397 U.S. 664 (1970) (permitting New York City Tax Commission to exempt religious organizations from paying taxes on property used solely for religious purposes); *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (upholding exemption of religious organizations from Title VII prohibition against religious discrimination). The States must always treat religion with a neutrality best described as "benevolent." *Walz*, 397 U.S. at 669; *see also School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring). The States may not "impede free exercise rights or any other individual religious liberty interest" in the name of federalism, or separation of church and state, or any other legal concept of similar abstraction. *Zelman*, 536 U.S. at 678-79.

For the reasons stated by respondent and the amici States of Texas et al. in their briefs, the Washington Promise Scholarship Program violates the neutrality

principle of the first amendment. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 846 (1995) (discussing requirement of neutrality in the Establishment Clause); *Smith*, 494 U.S. at 877 (discussing requirement of neutrality in the Free Exercise Clause). By employing Mr. Davey's declaration of a major in theology as the sole basis for its decision to deny him a Promise Scholarship, the State of Washington has overtly discriminated against religion. This discrimination cannot in any way be characterized as the "benevolent neutrality" commanded by the federal Constitution.

II. Alabama's Own Constitutional History Exemplifies the Invidious Purpose of State Education Funding Programs That Exclude Participants on the Basis of Their Religion.

Alabama, like the State of Washington, has a Blaine provision in its Constitution that purports to forbid the transfer of public funds to religious schools. Ala. Const. of 1901, art. XIV, § 263. Blaine provisions, or amendments, are rooted in anti-Catholic sentiment that was prevalent in this country during the latter half of the nineteenth century. Alabama history illustrates this discrimination well. Blaine amendments afford no justification whatsoever for modern-day discrimination against religion.

Before the emergence of anti-Catholic sentiment in Alabama, state education funds were shared among all private schools, both secular and religious, including Catholic schools. Bigotry against Catholics led to the inclusion of a Blaine provision in the Constitution in 1875. That provision, in turn, led to the creation of a student grant program in 1978 that, like Washington's Promise Scholarship program, discriminates against students who choose to major in theology. Unlike

Washington, however, Alabama would now concede that its student grant program violates the first and fourteenth amendments of the United States Constitution.

A. Alabama's Blaine provision was designed to stifle the growth of Roman Catholic beliefs within the State.

Before the enactment of its first Blaine provision in its Constitution of 1875, Alabama had a history of encouraging education in the State by distributing available public funds among existing private institutions, including religious schools. Catholic schools, which were the oldest schools in the state, participated in this distribution of funds without discrimination, until an anti-Catholic sentiment, common to other regions of the country, took root in the latter half of the nineteenth century. Beginning in 1854, anti-Catholic sentiment led Alabama to discriminate against Catholic schools in the sharing of public school revenues. Then, in 1875, through the incorporation of a Blaine provision into its Constitution, Alabama ensured that no public funds would be provided for Catholic religious instruction by prohibiting expenditures of state education funds "for the support of any sectarian or denominational school."

Settlers in territorial Alabama had begun working to establish schools as early as 1805. Lucille Griffith, *Alabama: A Documentary History to 1900* 246 (Univ. of Ala. Press, 2d ed. 1972). Green Academy in Huntsville, in the northern part of Alabama, was chartered by the territorial legislature in 1812. *Id.* at 247-48. Like many early schools in Alabama, Green Academy was a hybrid institution: It was chartered by the government and received funds from the public treasury and from a

state-sanctioned lottery, but it also relied heavily on private tuition. *Id.* at 248.

In 1819, when Alabama was admitted to the Union, the sixteenth section of each township was reserved for the support of a school for that township. Harriet E. Amos, *Cotton City: Urban Development in Antebellum Mobile* 179 (1985). The 1819 Constitution of Alabama provided no public funding for education, beyond the income generated by the sixteenth-section lands, but simply provided, "Schools and the means of education shall forever be encouraged in this State." Ala. Const. of 1819, art. VI.

By 1823, advertisements appearing in newspapers made evident that several private schools were operating in Mobile. Charles Grayson Summersell, *Mobile: History of a Seaport Town* 30 (1949). Before 1826, however, there was no legal authority in Alabama for the regulation of schools by a division of government.

The first public school system in Alabama was established in its oldest city, Mobile. In 1826, the Alabama Legislature enacted a bill drafted by Mobile's representative, Willoughby Barton, establishing a board of Mobile School Commissioners and empowering the board to establish and regulate schools in Mobile County. Pamphlet Acts of 1825-26, pp. 35-36, approved Jan. 10, 1826; Amos, *Urban Development* at 180. This act also provided public sources of funding for education in Mobile County, in addition to the income from sixteenth-section lands, including revenue from taxes imposed on auction sales, court filing fees, fines, penalties, license taxes on theatrical performances, and a school fund lottery. *Id.*

The revenues generated for education in Mobile County were not sufficient to establish free public schools. Instead, for the next few years, school commissioners used public funds to enhance the education provided by private schools. This funding in turn enabled the private schools to provide free or reduced tuition for a few indigent pupils. Amos, *Urban Development* at 181.

The Mobile school board envisioned an organized system of education, however. In 1835 and 1836, the three-story Barton Academy was constructed on Government Street. Amos, *Urban Development* at 181. The construction was funded by private donations, a city loan, a state-approved lottery, the school commissioners' fund, and a loan taken out by the commissioners. *Id.* at 181-82. For several years the school commissioners struggled to pay off the construction debt and keep Barton Academy open, but limited funding forced them to close the school. *Id.* at 182-83. When the public free school closed, the school commissioners channeled public funds, including taxes for education, into free schools operated by churches. *Id.* at 183.

By the mid-nineteenth century, both Catholics and Protestants operated free schools in Mobile. The Catholic free schools were the oldest free schools in the City of Mobile. Amos, *Urban Development* at 184. In 1838, a Catholic orphanage was established in Mobile, and at about the same time, two Catholic schools were opened, one for boys and one for girls. Oscar Hugh Lipscomb, *The Administration of Michael Portier, Vicar Apostolic of Alabama and the Floridas, 1825-1829, and First Bishop of Mobile, 1829-1859* 228 (1963). By 1844, the Catholic schools were providing instruction to 90 orphans in addition to 60 girls and 40 boys. *Id.* at 229.

In 1842, the Methodists, in cooperation with the Unitarians, opened the first Protestant free school in Mobile. Amos, *Urban Development* at 184.

In 1846, the Alabama Legislature began permitting taxpayers to redirect the "common and ordinary school taxes" that were being levied for educational purposes in Mobile County to the free schools operated by churches. Acts of the Annual Session of the General Assembly of Alabama, Held in the City of Tuscaloosa, Commencing on the 1st Monday in December 1845, No. 256, pp. 192-93, approved Feb. 4, 1846 (John McCormick, Printer, Tuscaloosa, Ala., 1846). The act further provided "that admission to said school shall be free to all children" and "without distinction of faith." Thus, "a taxpayer could designate whether his school tax would go to a free school run by his denomination or to the general school fund." Amos, *Urban Development* at 183. Under the 1846 act, public school taxes in Mobile were re-directed to the Methodist Free School and eventually to the Presbyterian Bethel School and the Catholic and Episcopal free schools. *Id.*

By mid-century, for purposes of administration, the Catholic schools had been divided into "pay" and "free" schools. Lipscomb, *Administration of Michael Portier* at 230. Income from the pay schools was being used to defray the expenses of the free schools. *Id.* In 1851, receipts from the pay schools accounted for $2,225 in the budget of the free schools. *Id.* at 233.

That same year, the budget of the free schools included an appropriation of $500 from the commissioners of county revenue, $375 from the school board, and $195 from municipal funds. *Id.* By 1852, the City of Mobile was contributing public funds to the Presbyterian, Catholic, Episcopal, and Methodist free schools. Amos, *Urban Development* at 184. Thus, the

Catholic and Protestant free schools of Mobile County operated successfully for a time as hybrid institutions, relying on both public and private funding.

Among the other schools in operation in Mobile during this time was Spring Hill College, founded in 1830 by the Right Reverend Michael Portier, the first Bishop of the Catholic Diocese of Mobile. Rose Gibbons Lovett, *The Catholic Church in the Deep South: The Diocese of Birmingham in Alabama: 1540-1976* 5 (1980). Spring Hill was the second college in Alabama and the first permanent Catholic college in the South. William Warren Rogers et al., *Alabama: The History of a Deep South State* 325-26 (1994). It was placed under the jurisdiction of the Jesuits in 1847. *Id.* Judson Female Institute was founded by Baptists at Marion in 1938. By 1847, the Baptist Bible Society stated that it was planning for Judson to serve as a "normal school," i.e. a college for training elementary school teachers. *Minutes of the Alabama Baptist State Convention and of the Baptist Bible Society, Nov. 21, 1847* 12 (J.W. Spalding, printer, Marion, Ala.). In 1854, Methodists founded Southern University at Greensboro. Rogers, *Deep South State* at 326.

Meanwhile, an anti-Catholic sentiment was brewing in Alabama. By 1843, anti-Catholic sentiment was being openly expressed. That year, *The Alabama Baptist* denounced "Popery" in an article, charging that Roman Catholics were seeking to replace the "powers of government" with an allegiance to the Pope, by systematically "superintend[ing] and direct[ing] the systems of education" in the United States. The article charged that "several hundreds of Jesuit priests" had been sent from Rome to the United States, "to bring the common schools of the United States exclusively under

their control." "Popery," *The Alabama Baptist,* Vol. I, No. 45, p. 2 (Dec. 9, 1843).

In 1850, anti-Catholic sentiment was directed at the perceived dangers posed by Catholic educational institutions. *The South Western Baptist* (formerly *The Alabama Baptist*), warned of the dangers of allowing children to attend Catholic schools:

> The church of Rome has dotted various parts of the South with her schools and seminaries for young ladies. In these, the daughters of many of the most respectable and wealthy Protestants are educated. No one who is aware of the object for which such schools were originated, or with the course of discipline and instruction adopted in them, can suppose that young ladies can pass through them untouched by the sentiments or superstitions of Popery. Many young ladies of these schools have entered the Roman Catholic church very much to the grief of their parents. The parents had committed their daughters to the institutions, receiving the usual pledges from the instructors that nothing should be done to unsettle the religious opinions they had taught their children. With such pledges they thought there was no danger. They did not believe it to be a dogma of the Roman church "that no faith is to be kept with heretics." But when it was too late to save their daughters they most sincerely regretted that they ever sent them to such schools. In every place, I hear startling and melancholy facts on this subject.

"Influence of Popery at the South," *The South Western Baptist* (formerly *The Alabama Baptist*), Vol. II, No. 38, p. 1 (Dennis Dykous, Printer, Nov. 20, 1850). Two months later, another article warned readers of the

"tendency of Papal domination," asserting that the "chief object" of Roman Catholicism during the "last three centuries" has been to "stunt the growth of the human mind." "Influence of the Church of Rome," *The South Western Baptist,* Vol. II, No. 46, p. 1 (Jan. 15, 1851).

Three years later, Alabama enacted anti-Catholic legislation directed at the only public system of education that existed in the state at that time: the Mobile County school system. The act prohibited the diversion of Mobile County pubic school funds to any school "that is not strictly common to all children of the county, or to any that is under sectarian influence or control." Acts of the 4th Biennial Session of the General Assembly of Alabama, Held in the City of Montgomery, Commencing on the 2nd Monday in November 1853, No. 307, pp. 190-91, approved Jan. 16, 1854 (Brittan & Blue, State Printers, 1854). Later during that same session, legislation was passed to establish a system of public schools throughout the rest of Alabama. *Id.*, No. 6, pp. 8-19, approved Feb. 15, 1854. This statute gave the superintendent of education the duty "to carefully guard that no sectarian religious views shall be inculcated in such schools." *Id.*, art. II, § 3(9). Article V, section 2(16) of this same statute provided as follows:

> In every school there shall be at least one teacher, who shall be authorised, under the direction of the trustees, to enforce such *moral, social and educational discipline* as may be necessary to good order and studious habits; and with the consent of the said trustees, he shall have the power to remove from the school any refractory or *immoral* pupil, when the welfare of the institution may require it.

(Emphasis added.)

In 1854, the growing anti-Catholic sentiment in Mobile led to charges against the Catholic Sisters of Charity who had been given charge of the City Hospital in 1852. Lipscomb, *The Administration of Michael Portier* at 261-65. In 1853, the Sisters of Charity had been "universally praised for their selfless dedication to the sick" during an epidemic of yellow fever — a dedication that, indeed, cost two of the Sisters their lives. *Id.* at 261-62. By the summer of 1854, however, the Know-Nothing Party had organized in Alabama, and Mobile was one of their strongholds. *Id.* at 262. The Sisters of Charity came under attack, and sixteen charges were lodged against their administration of the hospital. *Id.* Despite a complete lack of evidence to support the charges, political considerations caused the mayor to cast a deciding vote against the Sisters. *Id.* at 265. The mayor's political instincts, though pusillanimous, were astute. The next year the Know-Nothing Party captured every office in the City of Mobile. *Id.*

The Know-Nothing party entered Alabama state politics in the gubernatorial race of 1855, seeking to reform "everyone who disagreed with them or anyone who was Catholic or of foreign birth." John Craig Stewart, *The Governors of Alabama* 96 (1975). The party gained support, and as a result, "there were even some floggings of Catholics and 'foreigners' in the old civilized city of Mobile." *Id.* The Know-Nothing candidate for Governor, George D. Shortridge, lost the election to the incumbent but received over 30,000 votes. *Id.* at 97.

The 1875 Alabama Constitution contained the state's first "Blaine" provision: "No money raised for the support of the public schools of the State shall be

appropriated to, or used for, the support of any sectarian or denominational school." Ala. Const. of 1875, art. XIII, § 8. As originally worded, the provision read: "No money raised for the support of the public schools of this State shall be appropriated to, or used for the support of any sectarian school." An amendment was offered that added the words "or denominational" after the word "sectarian," and the provision was later adopted with the suggested amendment, without discussion. *Journal of the Constitutional Convention of the State of Alabama 1875* 155 (W.W. Screws, State Printer, Montgomery, Ala., 1875). The 1875 Constitution also provided as follows:

> No appropriation shall be made to any charitable or educational institution not under the absolute control of the state, *other than normal schools*, established by law for the professional training of teachers for the public schools of the state, except by a vote of two-thirds of all the members elected to each house.

Ala. Const. of 1875, art. IV, § 34 (emphasis added). The exception for "normal schools" appears designed to have permitted Judson Female Institute, a Baptist school, to continue receiving state funds.

The Blaine provision was carried forward into the present Constitution of Alabama, which states, "No money raised for the support of the public schools shall be appropriated to or used for the support of any sectarian or denominational school." Ala. Const. of 1901, art. XIV, § 263.

B. Alabama has recognized that its student grant program, which, like Washington's Promise Scholarship program, excludes religious participants and was enacted to comply with a Blaine provision, violates the first and fourteenth amendments.

In 1978, Alabama enacted a student grant program to provide financial assistance to residents of the State who chose to attend "accredited independent colleges and universities." Ala. Code § 16-33A-2 (1975). The purpose of the program was to "narrow the gap in student charges between public universities and colleges and independent institutions of higher education in Alabama." *Id.* Like Washington's Promise Scholarship program, Alabama's program excluded religious participants so as to comply with the Blaine provision of the Alabama Constitution. The program defined an "eligible student" as one that "[i]s not enrolled and does not intend to enroll in a course of study leading to an undergraduate degree in theology or divinity." Ala. Code § 16-33A-1(4)(f) (1975). The program further defined "approved institution" as one having "an academic curriculum which is not comprised principally of sectarian instruction or preparation of students for a sectarian vocation and which does not award primarily theologian or seminarian degrees." Ala. Code § 16-33A-1(3) (1975). Other Alabama education statutes and regulations similarly purport to require discrimination against religion. *See, e.g.*, Ala. Code § 16-18A-1(4)(f) (1975); 6 Ala. Admin. Code R. 300-4-3-.01 et seq.

This discrimination was thought to be required by Alabama's Blaine provision. In 1973, the House of Representatives of the Alabama Legislature sought an advisory opinion of the Alabama Supreme Court with

respect to a student grant program similar to the program created in 1978. *Opinion of the Justices*, 280 So. 2d 547 (Ala. 1973). The 1973 grant program differed from the 1978 program in one important respect: the 1973 program did not restrict eligibility based on the student's choice of a religious course of study or of a religious school. *Id.* The House of Representatives requested the opinion of the Alabama Supreme Court on the constitutionality of the proposed student grant program. *Id.* Six of the nine Supreme Court Justices expressed the opinion that the proposed student grant program violated Alabama's Blaine provision, as well as the first amendment of the United States Constitution. *Id.* at 553. In 1978, a revised student grant program was enacted, restricting participation to students who were not pursuing "a course of study leading to an undergraduate degree in theology or divinity." Ala. Code § 16-33A-1(4)(f) (1975).

Because it discriminates against an individual on the basis of religion, Alabama's student grant program is subject to strict scrutiny, as is Washington's Promise Scholarship program. *Lukumi Babalu*, 508 U.S. at 533 (1993); *Smith*, 494 U.S. at 877; *Valente*, 456 U.S. at 244-46. The Blaine provision of the Constitution of Alabama, itself grounded in anti-religious prejudice, does not provide a compelling state interest that justifies such discrimination. Neither does Washington's Blaine amendment.

Fortunately, the need for a federal constitutional challenge to Alabama's student grant program was mooted in 1999. After the decision of this Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997), invalidating the federal Religious Freedom Restoration Act, Alabama enacted its own Religious Freedom Amendment. Ala. Const. of 1901, amend. 622. The

Alabama Religious Freedom Amendment (ARFA) recognizes that federal and state laws that appear "'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." *Id.* § II(2). ARFA secures to Alabama citizens the free exercise of religion and prohibits the branches of government — including the State and its political subdivisions, municipalities, and other local governments — from burdening a person's freedom of religion, even through laws of general applicability, unless the law furthers "a compelling governmental interest" and unless it is "the least restrictive means of furthering that compelling governmental interest." *Id.* § V. Because ARFA forbids the government to impose burdens on religious choices absent compelling justification, that portion of the 1978 student grant program which denies grants to students who "enroll in a course of study leading to an undergraduate degree in theology or divinity," Ala. Code § 16-33A-1(4)(f), does not survive ARFA.

In all events, with or without ARFA, it is the position of the Attorney General of Alabama that the 1978 student grant program violates the first amendment because it discriminates against religion. For the same reasons, Washington's Promise Scholarship program violates the first amendment. That other States may also have such discriminatory scholarship programs and may also still have Blaine amendments on their books is no reason to punch holes in the anti-discrimination principle that is the bulwark of free religious exercise in the first amendment.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

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In The Supreme Court of the United States

GARY LOCKE, Governor of the State of Washington, et al.,

Petitioners,

v.

JOSHUA DAVEY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICI CURIAE OF THE COUNCIL FOR CHRISTIAN COLLEGES & UNIVERSITIES, THE ASSOCIATION OF CATHOLIC COLLEGES & UNIVERSITIES, THE ASSOCIATION OF SOUTHERN BAPTIST COLLEGES & SCHOOLS, THE CENTER FOR PUBLIC JUSTICE, FAMILY RESEARCH COUNCIL, FOCUS ON THE FAMILY, AND CHRISTIAN LEGAL SOCIETY IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

Amici are associations of religious educational institutions, religious liberty advocacy groups, and public policy organizations. All are deeply concerned about government discrimination against religion. Because several amici have joined in a single brief, the interests of individual amici are stated in an Appendix. This brief is filed with consent of all parties.[1]

SUMMARY OF ARGUMENT

The State of Washington provides scholarships to high achieving students of modest income at *any* accredited college or university in the state, majoring in *any* subject, except for those majoring in theology from a religious perspective. This flagrant and facial discrimination against religious activity and religious viewpoints violates both the Free Exercise Clause and the Free Speech Clause. This basic point is well developed in the Brief of Respondent. We briefly review it here as a necessary basis for further arguments that place the case in broader constitutional perspective.

Discrimination in favor of or against religion violates the constitutional requirement that government be neutral toward religion. The *reason* for government neutrality is to prevent government from interfering with private religious choices and commitments. This obligation of neutrality is best understood as substantive neutrality, defined as minimizing government influence on religion, rather than formal neutrality, defined as a mere absence of religious classifications. But in this case, the two forms of neutrality converge. Washington's express religious exclusion violates formal neutrality, and its discouragement of theology majors violates substantive neutrality.

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[1] This brief was drafted entirely by the counsel named on its cover, and funded by the amici listed on its cover.

This discrimination has nothing to do with the reasons for restricting government funding of religion. If the state awards a scholarship to Joshua Davey based on his income and academic achievement, and if Davey uses that scholarship to study theology, it is Davey and not the state or its taxpayers that has directed money to religious uses. Using the scholarship to study theology would not entangle the state in religious questions; to the contrary, it is the challenged exclusion that requires the state to investigate theology programs and evaluate the perspective from which they are taught. No condition on Promise Scholarships interferes in any way with the autonomy of church affiliated colleges, except the very condition – no devotional theology degrees – that is being challenged. There is a common theme to these points: state interference with private religious choice is minimized when the state funds nothing, or when it funds everything within a neutrally defined category. Discriminatory funding is always the worst policy, because discriminatory funding pressures citizens to adapt their own religious choices to the state's favored categories.

The state has discretion to set its own church-state policy within the boundaries of the federal Constitution, but it has no authority to violate the federal requirement of government neutrality toward religion.

Nondiscriminatory Promise Scholarships, equally available for religious and secular majors, would be fundamentally different from the Virginia general assessment rejected in the Founders' generation. The essence of the general assessment was massive discrimination in favor of religious viewpoints. The general assessment would not have incidentally funded some religious application that was part of a broader and neutral category, and the state would have received no secular services for its money. Some of the state's amici claim that the general assessment controversy was about the funding of religious schools, citing one of the authors of this brief, among other scholars. The claim is mistaken, and the citations are egregious miscitations.

This case differs in three ways from other cases upholding refusals to fund constitutionally protected activities. First, in many of those cases, the state promulgated its own secular message, either directly or through paid intermediaries. Here, the state's only interest is in an educated citizenry; it has expressed no preference for particular majors or viewpoints apart from its exclusion of theology majors.

Second, many of those cases involved constitutional rights that do not require government neutrality. Government can vigorously express its preference for live birth so long as it does not "unduly burden" abortion. This is very different from the state's obligation to be neutral between religion and nonreligion. The refusal to fund abortion was not neutral, but it did not have to be.

Third, all of those cases involved a mere refusal to support a particular activity with government funds. They did not withhold other government funds from all persons who continued the unfunded activity with their own money. But here the state has stepped over that line; because Davey majors in theology from a religious perspective, the state will not award any scholarship to be used for any courses.

ARGUMENT

I. The Denial of Davey's Scholarship Discriminates Against Religious Activity and Viewpoints.

Joshua Davey was eligible for a state Promise Scholarship to attend college on the basis of his academic record and his family's modest income. He was declared ineligible, however, because he decided to major in theology, along with business administration, at Northwest College. The state has made clear that the disqualifying feature of his theology major was that it would be taught from a "devotional" standpoint, that is, a standpoint "designed to induce religious faith." Brief for the Petitioners at 6. If the theology major at Northwest College reflected a "secular"

or "purely academic" approach to religion and the Bible, Davey would have kept his scholarship. *Id.* at 6, 10.

These undisputed facts establish that the Washington policy openly and explicitly discriminates against religious activity and viewpoints. The policy thus presumptively violates the Free Exercise and Free Speech Clauses.

A. Free Exercise and Nondiscrimination.

The "fundamental" and "minimum" requirement of the Free Exercise Clause is that a law may not single out religiously motivated activity for discriminatory treatment. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 523, 532 (1993). "A law that targets religious conduct for distinctive treatment" must "undergo the most rigorous of scrutiny" and "will survive only in rare cases." *Id.* at 546. *See also Employment Div. v. Smith*, 494 U.S. 872, 877-78, 888 (1990). This principle forbids laws that "impose special disabilities on the basis of . . . religious status." *Smith*, 494 U.S. at 877 (citing *McDaniel v. Paty*, 435 U.S. 618, 643 (1978)). The "unique disability" imposed in *McDaniel* was denying to members of the clergy a generally available opportunity – the right to serve in the state legislature if elected by the voters. *Id.* at 632 (Brennan, J., concurring).

Sherbert v. Verner, 374 U.S. 398 (1963), likewise makes clear that "the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Id.* at 404. *Sherbert* held that when the state denied unemployment benefits to a claimant who refused to work on Saturday, her sabbath, it placed "unmistakable" pressure on her "to forego that religious practice." *Id.* Of course the Court rejected one broad interpretation of *Sherbert* in *Smith*, but it reaffirmed *Sherbert*'s holding on grounds that are clearly applicable here. *See Smith*, 494 U.S. at 883-84 (reading *Sherbert* to require that government respect religious reasons for acting when it respects secular reasons for similar conduct). *Sherbert*, *McDaniel*, *Smith*, and *Lukumi* all stand for the proposition that the state cannot

discriminate against a religious practice without a compelling reason. At least where there is discrimination, it remains clear that the Free Exercise Clause is violated when a citizen's "declared ineligibility for benefits derives solely from the practice of her religion." *Sherbert*, 374 U.S. at 404.

There is no question that the Promise Scholarship is a generally available benefit, and that the exclusion of theology majors imposes a unique disability on those majors. Scholarships are available to students attending any accredited public or private college, taking any of the host of majors offered at those colleges. The state excludes only theology taught from a religious perspective. The ineligibility of students like Davey "derives solely" from their religiously motivated decision to major in theology. This singling out of religion from such a broad-based entitlement flagrantly violates the nondiscrimination principle. Here, as in *Lukumi*, the Court need not "define with precision" the standard for determining whether a funding condition is religion-neutral and "of general application" (508 U.S. at 543). Washington's singling out of theology majors for exclusion "fall[s] well below the minimum standard necessary to protect First Amendment rights" (*id.*).

The state does not bar Promise Scholarship students from all religiously oriented courses. Davey could have received a scholarship while majoring in business or any other non-theology major, even if his courses in that major included a good deal of religious teaching. But that fact does not help the state's case. The state in *McDaniel*, by disqualifying clergy from sitting in the legislature, "impose[d] a unique disability" on those who held their religious views "with such depth of sincerity as to impel [them] to join the ministry." 435 U.S. at 631 (Brennan, J., concurring). Similarly, by denying a scholarship for those who care enough about their religious beliefs to study theology, Washington "impos[es] a civil disability upon those deemed to be too deeply involved in religion." *Id.* at 639-40.

B. Free Speech and Viewpoint Discrimination.

Neutrality in the sense of nondiscrimination also is central in cases, such as this one, that involve religious expression.[2] The Free Speech Clause forbids singling out for unfavorable treatment speech that reflects a religious viewpoint. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector of the Univ. of Virginia*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981). This principle likewise applies where the discrimination against religion occurs in a program of government benefits. *Rosenberger*, 515 U.S. at 832-36.

In the terms of free speech doctrine, the Washington exclusion is a classic instance of discrimination by viewpoint. Promise Scholarships are available to those who study theology and religion from a "secular" perspective, but are denied to those who study religion from a perspective "designed to induce religious faith." Pet. Br. at 5-6.

The state and its amici try to claim that the exclusion of theology majors "is a neutral law that does not discriminate against religion." Pet Br. at 39-40; see also Brief Amicus Curiae of American Civil Liberties Union *et al.* at 23-26. Part of their argument appears to be that the distinction between the "secular" and "devotional" study of religion is a distinction based on subject matter rather than viewpoint. See Brief of ACLU *et al.* at 24. This Court expressly rejected a similar distinction, between religious worship and other religious speech, in *Widmar v. Vincent*, 454 U.S. at 269-70 n.6.

The state's argument illustrates once again how regulators exploit this Court's deference to subject matter

[2] College education involves expression both by the student who chooses his school and courses, participates in classroom discussion, and writes papers, and by the college itself and its faculty.

exclusions. The state relies on a doctrine that authorizes governments to exclude whole subject matters from public places without having to offer any reason, thus "restrict[ing] speech by fiat." *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 694 (1992) (Kennedy, J., concurring). Without serious review of the reasons for subject matter exclusions, government may manipulate or gerrymander its definition of subject matter to exclude undesired viewpoints. It is futile for the Court to closely scrutinize viewpoint discrimination if it gives carte blanche to subject matter discrimination and permits subject matter to be defined in ways that closely track viewpoint.

In any event, the claim that the state is not engaged in viewpoint discrimination is facetious. Whether religion is studied from a secular perspective or a "devotional" one, the subject matter is still religion. Under the state's policy, Promise Scholarship recipients can pursue the University of Washington's major in religion – an example of the secular study of religion – and analyze New Testament books from the standpoint of "[m]odern scholarly methods of research and analysis." J.A. 68. But they cannot major in religion elsewhere and analyze New Testament books from the standpoint that they are divinely inspired. The state's brief perfectly sums up the viewpoint discrimination here: Davey loses his scholarship because the courses in his major "teach the Bible as truth, whereas a purely academic understanding [for which a student could receive a scholarship] would not necessarily subscribe to the Bible as ultimate truth." Pet. Br. at 10. Likewise, students can receive scholarships and take a secular approach to St. Augustine, Kierkegaard, and other thinkers on "God, man, knowledge, and authority." J.A. at 72, 68. But a religion major at Northwest College is denied a scholarship because he studies the very same thinkers from the standpoint of whether and how they support Christian faith. It could scarcely be clearer that the state discriminates between different viewpoints concerning the same subject matter.

II. Discriminatory Denial of Funding Here Violates the Religion Clauses' Fundamental Principle of Respecting Voluntary Choices and Commitments in Religious Matters.

The amici joining this brief believe strongly in the principle of nondiscrimination against religious activities and viewpoints. We agree that this case is controlled by *Lukumi*, *McDaniel*, and *Rosenberger*. But we also think it important to put this case in a broader context. The state points out that the Court has forbidden public schools to engage in religious instruction but has allowed them to teach about religion "'objectively as part of a secular program of education.'" *Id.* at 40-41 (quoting, *e.g.*, *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963)). From this the state falsely asserts that it may discriminate against religious instruction, and in favor of secular instruction, when the speech and activity at issue are private and voluntary. This argument is mistaken. More broadly, we wish to explain why the First Amendment requires or permits distinctive treatment for religion in some situations, but requires nondiscrimination against religion in this case. Both nondiscrimination in this case and distinctive treatment in other situations ultimately serve a more fundamental goal: that government should avoid interfering with the voluntary choices of private individuals in religious matters.

A. The Ultimate Value Underlying the Religion Clauses is Substantive Neutrality, or the Protection of Voluntary Choices and Commitments in Religious Matters.

The ultimate goal of the Constitution's provisions on religion is religious liberty for all – for believer and nonbeliever, for Christian and Jew, for Protestant and Catholic, for Western traditions and Eastern, for large faiths and small, for atheist and agnostic, for secular humanist and the religiously indifferent, for every individual human being in the vast mosaic that makes up the American people. The ultimate goal is that every American should be

free to hold his own views on religious questions, and to live the life that those views direct, with a minimum of government interference or influence.

The fundamental principle to achieve that goal is for the government to maintain "substantive neutrality" toward religion:

> [S]ubstantive neutrality [means] this: the religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance. . . . [R]eligion [should] be left as wholly to private choice as anything can be. It should proceed as unaffected by government as possible. . . .
>
> This elaboration highlights the connections among religious neutrality, religious autonomy, and religious voluntarism. Government must be neutral so that religious belief and practice can be free. The autonomy of religious belief and disbelief is maximized when government encouragement and discouragement is minimized. The same is true of religious practice and refusal to practice. The goal of maximum religious liberty can help identify the baseline from which to measure encouragement and discouragement.

Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1001-02 (1990).

Substantive neutrality is not always the same as formal neutrality, that is, facial nondiscrimination or the absence of religious classifications. *See, e.g., Lukumi*, 508 U.S. at 561-62 (Souter, J., concurring). Sometimes the government may or even must treat religion differently from other ideas and activities in order to preserve the goals of substantive neutrality: private religious liberty and minimum government interference in religious choices and commitments. For example, the government may accommodate private, voluntary religious exercise by exempting it from burdensome regulation, even if the exemption does not "come packaged with benefits to

secular entities." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 338 (1987). Even though such an exemption gives religion distinctive treatment, it is constitutionally legitimate if it "does not have the effect of 'inducing' religious belief, but instead merely 'accommodates' or implements an independent religious choice." *Thomas v. Review Bd.*, 450 U.S. 707, 727 (1981) (Rehnquist, J., dissenting on other grounds).

When the government speaks for itself, it must also treat religion distinctively. Neutrality requires that the government not express religious views itself or take a position on religious matters, even though it may express views on a host of nonreligious matters and even seek to lead public opinion concerning such matters. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 591 (1992) (unlike in secular matters, "[i]n religious debate or expression the government is not a prime participant"); *Schempp*, 374 U.S. at 222-26 (holding that neutrality forbids public schools to conduct Bible readings or other religious exercises).

The state and its amici rely on *Schempp* and other government speech decisions in arguing that the First Amendment generally distinguishes religious from secular instruction. *See* Pet. Br. at 40-41; Brief of ACLU *et al.* at 25. But the state commits a fundamental category mistake. Restrictions on the government's own religious speech do not authorize government to discriminate against the voluntary religious activity and expression of private individuals. "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (emphasis in original).

As the Court emphasized in *Rosenberger*, a holding that the state "may not discriminate based on the viewpoint of private persons whose speech it facilitates" does not govern issues concerning "the [state's] own speech, which is controlled by different principles." 515 U.S. at 834.

Plainly, the instruction at private colleges where Promise Scholarships may be used is private speech and activity, not government speech. The scholarships can be used for a vast range of educational choices, including any accredited college and any major except for theology from a religious viewpoint. Such a wide variety of options will surely include teachings that conflict with each other, as related subjects are taught by a variety of faculty at a variety of colleges. As with the list of publications in *Rosenberger*, these conflicting perspectives cannot logically be called the position of the state. *See* 515 U.S. at 833.

The private nature of this speech and activity is also evident from the student's right to use the scholarship for religious instruction as long as it occurs in a non-theology major. Davey is a double major, in theology and business administration. If he had declared only the business major, and taken all the same theology courses as electives, he could have used his state scholarship to pay for any of them. But if using the scholarship really made the courses government speech, Davey could not apply the scholarship to any religious courses at all.

The fact that the state can teach about religion but not teach religion as a creed does not undercut the fact that the distinction between these two is one of viewpoint. *Weisman* and *Rosenberger* together teach that government must make such a viewpoint distinction between religion and nonreligion in its own speech, but that it cannot do so when providing benefits to private parties engaged in expression. The explanation lies again in the underlying principle of substantive neutrality, that government should as much as possible minimize its effect on citizens' diverse religious choices. In the context of government speech, neutrality means that government is constrained to express neutral viewpoints or to say nothing at all. Neutral expression on controversial subjects is hard to maintain; it is usually easier to preserve neutrality by silence:

> [G]overnment can respect religious pluralism when it gives financial aid, by giving aid to any group (religious as well as non-religious) that

> provides the requisite services – but it is far more difficult for government to respect and promote religious pluralism when it engages in religious speech itself. Any statement the government makes is bound to favor one faith over another; even an ecumenical statement that seeks to be inclusive of all faiths favors ecumenical religion over the more sectarian kinds.

Thomas C. Berg, *Religion Clause Anti-Theories*, 72 Notre Dame L. Rev. 693, 745 (1997).

In short, the way for the state to keep out of private individuals' choices about religion is to refrain from religious statements in its own speech, but to accord religious statements by private speakers the same treatment that it gives to secular statements. In the next two sections, we show that (1) denying Davey's scholarship because he chose a religious major interferes with his individual choice in religious matters and (2) denying the scholarship does not serve any other purpose that might justify this interference with individual choice.

B. The Discriminatory Denial of Funding Here Interferes with Voluntary Religious Choice.

The denial of Promise Scholarships to students such as Davey distorts individual choice in religious matters. The Court has repeatedly recognized that providing aid to private individuals under neutral, secular criteria and allowing them to use it at either religious or nonreligious schools promotes the "genuine and independent choices of [those] individuals." *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002); *see also Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Washington Dep't of Servs.*, 474 U.S. 481, 487-88 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993). Conversely, to withdraw aid because a student chooses a religious major interferes with the student's choices.

By declaring a major in pastoral ministries, Davey lost nearly $2,700 in scholarship aid for two years of college. *Davey v. Locke*, 299 F.3d 748, 750-51 (9th Cir. 2002). Common sense, precedent, and the record all suggest that the prospect of losing such an amount will often affect a student's choice of major, especially for Promise Scholarship recipients with their modest family incomes. *See* Wash. Admin. Code § 250-80-020(12) (1999) (recipient's family income cannot be more than 35 percent above the state median). In *Sherbert v. Verner*, this Court found unconstitutional distortion of religious choice in the prospect of losing 22 weeks of modest unemployment benefits. 374 U.S. at 404; *id.* at 417-18 (Stewart, J., concurring). Northwest College's financial aid officer testified that students consider changing their majors to retain their state scholarships:

> Being a Christian school, and working with the State, this issue, as you can imagine, comes up. And with the student who is perhaps struggling with being eligible for State money and their major, I talk with them. . . .
>
> [I say that i]f you are planning to become a minister, no matter what your major is, this warrant, this check, this award, is not intended to go to a student in your position. And I talk with the student, by just changing your major to get this award is not the correct thing to do.

J.A. at 156-57. The counselor seems to emphasize the spirit rather than the letter of the law, for a student taking a non-theology degree can retain his scholarship even if he is preparing for the ministry. Wash. Admin. Code § 250-80-020(12). But the key point is this: the counselor's testimony confirms that students consider which choice of major will cause them to lose their Promise Scholarship.

By excluding theology studies taught from a "devotional" perspective, the state creates an incentive for students not to pursue that major and instead to pursue a major less infused with religious teaching. "[T]he pressure upon [students] to forego [a theology major] is unmistakable." *Sherbert*, 374 U.S. at 404. In addition, because the law allows scholarships for those pursuing a religion major taught from a secular perspective, it may induce some

students committed to a religion major to choose a college whose approach to the study of religion is more secular and less devotional. At the margin, it might induce some colleges to tip their religion courses from the devotional toward the secular in order that their religion majors may receive Promise Scholarships. These distortions of private choice violate the First Amendment.

C. Denying Funding in This Case Serves None of the Purposes of the Religion Clauses.

Refraining from state funding of private religious education can, in some situations, serve the Religion Clauses' goals of liberty and religious autonomy. Government money is a powerful source of government influence; government expenditures on religion generally expand government influence in a field where that influence should be minimized. Describing the same point from the private perspective, voluntary funding of religious instruction often maximizes individual liberty and the influence of private choice. Each individual can decide when, how, and how much to contribute to whom, and whether to contribute at all. Voluntary funding of religious organizations protects individual conscience and keeps government out of religion.

But Washington's exclusion of theology majors like Davey serves none of these goals. Indeed, it transgresses a number of them. Government funding decisions have the least impact on private religious choice when government funds *nothing*, or when it funds *everything* within a neutrally defined category. Government does maximum harm to free choice when it funds some choices and refuses to fund their directly competing alternatives.

1. Impositions on taxpayers' consciences.

A common and longstanding argument against state support of private religious organizations is that it forces taxpayers to support instruction in religious doctrines that

they may conscientiously oppose. The objection goes back as far as Thomas Jefferson's charge "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." *A Bill for Establishing Religious Freedom* (Va. 1786), quoted in Michael W. McConnell *et al.*, *Religion and the Constitution* 69-70 (Aspen 2002). Respecting the taxpayer's choice not to fund religion may be a consideration in some cases. But it is not in this case.

The state plainly does not think that including students' religious choices in Promise Scholarships coerces any taxpayers to support religious instruction. The state allows scholarships for students at religious colleges such as Northwest majoring in any subject other than theology. This is so even though non-theology majors are likely to receive a great deal of religious instruction at Northwest, which (like many other religious colleges) aims to educate all students "from a 'distinctly Christian' point of view." 299 F.3d at 751 (quoting http://www.nwcollege.edu/about/index.html).

Promise Scholarships should not be seen as coercing taxpayers to support religion. On facts identical to those here, this Court held that when a college student chooses to use neutrally available aid for a religious course of study at a religious college, "the decision to support religious education is made by the individual, not by the State." *Witters*, 474 U.S. at 488. The same factors that made the connection between the state and the religious instruction "highly attenuated" in *Witters* (*id.*) are present here. Nothing in the scholarship program gives recipients like Davey any financial incentive to choose a religious course of study, and indeed a relatively small percentage are likely to do so. *See id.* In other words, the state is simply forcing the taxpayer to support a student's education – which benefits the state in secular terms by "assuring the development of the talents of its qualified domiciliaries" (*Davey*, 299 F.3d at 756). It is the student's decision, not the state's, for the education to be religious.

The state and its amici claim a particular interest in keeping funds from going to clergy training, but that does not change the logic of the situation. Larry Witters was also training for the ministry, but the Court unanimously rejected a challenge to state funding of his education. If the choice of how to use the funds is the student's, not the state's, then the choice to pursue training for the ministry is the student's as well. This same point disposes of the amici's argument that some denominations will benefit more than others who do not train their clergy at accredited undergraduate institutions (Brief of ACLU *et al.* at 19-20). Again, the connection between the state and the different results for different denominations is highly attenuated. The kind of disparate impact of which the amici complain could arise under any program funding college education. Some denominations are more likely than others to employ non-clergy staff trained at undergraduate schools with the help of state scholarships. Some denominations would be less likely than others to employ college-educated church workers at all.

Any program of funding under neutral criteria will result in differential impacts because of the differences in the choices and personal characteristics of students of different faiths. These varying disparate impacts do not justify purposeful, facial discrimination against religious choices compared with all other choices of major.

2. Government entanglement in religious questions.

Some forms of funding require the government to make discretionary decisions about which activities are valuable enough to fund, how much funding they should receive, and so forth. When decisions involving religious recipients turn on discretionary rather than bright-line factors, there is a danger that government will interfere in and distort private religious decisions by deciding whom to fund, or in what amount, according to political pressure, popularity, or the religious preferences of the dominant faction. *See, e.g., Lemon v. Kurtzman*, 403 U.S. 602, 622-23

(1971) (warning about competing political pressures for discretionary education appropriations). But obviously, respecting the choice of students like Davey to use their scholarships for theology study does not involve the state in any religious questions. The state simply offers the scholarship to students who qualify because of academic achievement and family income, without regard to whether the student chooses a religious use and without making any subjective judgment.

It is the exclusion of students like Davey that puts the state in the improper position of drawing discretionary and religiously significant lines. The state must decide, for example, which theology degrees are taught from a secular, "academic" perspective and which are taught in ways "designed to induce religious faith." Some programs may fall clearly in one category or the other: the University of Washington classes (see *supra* p. 7) may be clearly secular, while Northwest College classes may be clearly devotional. But the line may be far less clear at other colleges, which try to maintain an often "precarious balance," giving weight to both the teachings of their church and the standards of the secular academy. See Stephen L. Carter, *The Constitution and the Religious University*, 47 DePaul L. Rev. 479, 485-86 (1998). For example, consider a policy statement of Brigham Young University:

> At BYU, individual academic freedom is based not only on a belief (shared by all universities) in the value of free inquiry, but also on the gospel principle that humans are moral agents who should seek knowledge in the sacred as well as in the secular, by the heart and spirit as well as by the mind, and in continuing revelation as well as in the written word of God.

Statement on Academic Freedom at Brigham Young University, reprinted in Douglas Laycock, *The Rights of Religious Academic Communities*, 20 J. Coll. & Univ. L. 15, 36 (1993).

It is far from clear how the state should apply its secular/devotional distinction if Brigham Young were located in Washington. To decide whether BYU theology

degrees were eligible, the state would have to examine their content closely. It would have to conduct the kind of "comprehensive, discriminating, and continuing state surveillance" that this Court has said creates excessive entanglement between church and state. *Lemon*, 403 U.S. at 619.

3. Recipient schools' autonomy.

Even if the state offers a funding program with no religious conditions on eligibility, the funding might still raise Religion Clause concerns if it comes with other conditions limiting the autonomy of participating religious schools. Just as religious conditions distort the religious choices of those eligible for scholarships, such conditional funding might create incentives for a religious school to compromise its independent mission and message and conform to the state's views and policy goals. But such concerns are absent or minimal here. There has been no assertion that any conditions accompanying Promise Scholarship eligibility might realistically restrict a religious school's autonomy – except the one that Davey challenges. Again, scholarships are available to students at any accredited undergraduate institution in the state, and for any program of study save one. The only significant condition is the very one at issue here – the exclusion of theology majors taught from a religious perspective. Ending that exclusion will end the one incentive that schools have to change their teaching so that their students can receive state aid.

4. The state's discretion to choose a church-state policy.

Finally, the state and its supporting amici fall back on the state's discretion to choose a church-state policy stricter than that of the Establishment Clause. But the state's rights argument is very weak in this case. As we have shown, the exclusion of students like Davey violates the core principles and policies of the Religion Clauses and serves none of the purposes that rules against funding of

religious education might serve. As this Court held in *Widmar*, 454 U.S. at 277, to withhold a widely available benefit from an activity simply because of the religious viewpoint it reflects cannot be justified by the interest "in achieving greater separation of church and state than is already ensured under the Establishment Clause." Moreover, funding students in circumstances like Davey's is not merely permitted by the Establishment Clause; it is so clearly permitted that the question is not even close. The *Witters I* decision permitting such funding on identical facts was unanimous, including the votes of those justices who were the most restrictive of funding under the Establishment Clause – Justices Brennan and Marshall (the latter of whom wrote the Court's opinion).

Accordingly, to hold that the state may not discriminate against religious choices in this situation is far from holding that the state must fund religion whenever the Establishment Clause permits it. Most obviously, a state need not fund private education at all. But if it does choose to fund private education, it must have compelling justifications for discriminating against religion.

D. Nondiscriminatory Funding of Secular Functions Is Fundamentally Different From the Preferential Funding of Religious Functions that the Founders Rejected.

A fundamental episode in the American history of disestablishment is Virginia's rejection of the general assessment, more formally entitled *A Bill Establishing a Provision for Teachers of the Christian Religion*, reprinted in *Everson v. Board of Educ.*, 330 U.S. 1, 72-74 (1947) (Appendix to opinion of Rutledge, J., dissenting). The state and its amici rely on rejection of the general assessment as a reason to resist nondiscriminatory funding of scholarships for higher education. But the two programs are fundamentally different. Nothing like the general assessment has been seriously proposed since repeal of the Massachusetts establishment in 1833.

As its full title makes clear, the essence of the general assessment was a massive discrimination in favor of religious viewpoints. In a time of minimal government, Christian clergy and Christian places of worship were to be singled out for special subsidy. Supporters of the measure did all they could to make it nonpreferential *as among Christian denominations*. They even provided a secular alternative for non-Christians and conscientious objectors, who could decline to designate a church and thereby send their clergy tax to a fund for schools. *Id.* at 74.

But there was no attempt to make the general assessment neutral *as between religion and nonreligion*. No one claimed, or could have claimed, that clergy and church buildings fell within the neutrally drawn boundaries of some larger category of state-funded activities. And no one claimed, or could have claimed, that the state would receive any secular service or benefit not derived from the religious functions of the churches. The argument for the general assessment was the familiar argument for other forms of establishment – that the state would benefit from having a more Christian population. *Id.* at 72.

This case, and all modern funding cases, are fundamentally different. No one proposes to fund the inherently religious functions of churches, and no one proposes to fund religious organizations preferentially over secular organizations providing the same service. Instead, the state funds a service – in this case, higher education – that is offered by both secular and religious providers. Higher education at Northwest College meets all the state's accreditation requirements and offers a wide range of courses less infused with religion than those in the theology department.

In this case, the broad neutral category of higher education includes, as one of its many applications, the training of clergy. And the training of clergy is a core religious function. But for multiple reasons, the case is still like the modern funding cases and unlike the general assessment: because the training of clergy is so clearly an incidental application of a vastly broader program;

because the training of clergy also serves the state's goal of educating its citizenry; because the decision to direct the money to religious uses is made by private citizens with no encouragement from the state; and because discriminatory exclusion of theology majors powerfully interferes with private religious choice, but treating them identically with all other majors does not influence anyone's choice. Excluding theology majors from a generally applicable program is a far greater departure from religious neutrality than is including them.

This Court has already decided cases where a neutrally defined category included some applications involving core religious functions. *Witters* was such a case; the Court held that a broad scholarship program could be applied to the training of clergy. 474 U.S. at 489. And *Rosenberger* was such a case; the magazine at issue there was core religious speech, permeated with evangelical Christian faith. *See* 515 U.S. at 825-26; *id.* at 865-67 (Souter, J., dissenting). The secular benefit to the state was not in the magazine's religious speech as such, but in the creation of a broad and nondiscriminatory forum for ideas. Promise Scholarships present one more in a series of modern funding cases, in which the state pays for a secular benefit and a religious institution provides that benefit in conjunction with religious functions of its own.

The state and its amici are well aware of the difference between modern controversies, involving nondiscriminatory funding of secular functions performed in religious contexts at religious institutions, and the general assessment's discriminatory funding of religious functions. Some of those amici try to bridge the gap with egregious miscitation. These amici claim that Madison and Jefferson opposed "an effort by the Virginia Assembly to impose an assessment for the support of houses of worship and teachers of religion, *including teachers in private religious schools*" (emphasis added). Brief Amicus Curiae of Historians and Law Scholars on Behalf of Petitioners at 6 & n.8. They cite for this proposition Douglas Laycock and Thomas Buckley, neither of whom says any such thing. They go on to claim that "Jefferson and Madison viewed their

constitutionally based principle as applying in the religious school context," *id.* at 7 & n.14, citing Laycock and Thomas Curry, neither of whom says any such thing.

Each of the cited sources simply describes the assessment bill's opt-out paragraph, which provided that the payments of any taxpayer who failed to designate a church should be paid "into the public Treasury, to be disposed of under the direction of the General Assembly, for the encouragement of seminaries of learning." 330 U.S. at 74. Thomas E. Buckley, *Church and State in Revolutionary Virginia 1776-1787* at 108-09, 133 (Univ. Of Virginia Press 1977); Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 141 (Oxford Univ. Press 1986); Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875, 897 & n.108 (1986). Laycock shows that the reference to "seminaries of learning" meant schools for general education, not schools for the training of ministers. *Id.* Buckley and Curry treat that usage as obvious. The whole issue was theoretical; there was no general school fund in Virginia before 1810. J.L. Blair Buck, *The Development of Public Schools in Virginia 1607-1952* at 28-29 (Va. St. Bd. of Educ. 1952). Probably there were few Virginians in 1785 willing to publicly advertise themselves as non-Christians. But public advertisement was the price of exemption; the bill required public posting of an alphabetical list of taxpayers and the churches they had designated to receive their tax (330 U.S. at 73).

What is important here is that the provision for payment to a school fund was *not* an effort to support religious schools, as the state's amici contend; it was an effort to accommodate the possibility of non-Christian taxpayers. And it was *not* the subject of any controversy. Madison did not mention schools in his *Memorial and Remonstrance Against Religious Establishments* (reprinted in *Everson*, 330 U.S. at 63-72), the most complete compendium of secular and religious arguments against the assessment. Buckley's survey of other arguments against the assessment does not mention any attack on the schools provision. Buckley

at 113-43. The effort to convert this exemption for non-Christians into an attempt to raise money for religious schools is a gross distortion of history, for which the sources cited provide absolutely no support.

III. Decisions Permitting the Government to Put Conditions on Funding Are Inapplicable to This Case.

Notwithstanding the effects on religious choice from excluding students like Davey, the state argues that it is free to do so because its "decision not to subsidize religious instruction . . . does not infringe Davey's right to seek a theology degree." Pet. Br. at 20. In particular, the state claims that withdrawing the scholarship did not penalize Davey for exercising his right to study theology, because he could study business at one school, with a scholorship, and theology at another, using his own money. *Id.* at 25. The state cites this Court's decisions allowing government to refuse to pay for abortions, *e.g., Maher v. Roe*, 432 U.S. 464 (1977); *Rust v. Sullivan*, 500 U.S. 173 (1991); or for various forms of speech, *e.g., Rust*; *Regan v. Taxation With Representation*, 461 U.S. 540 (1983). The state's argument is mistaken here for two reasons, one legal, one factual.

A. The Decisions Approving Conditions Are Inapplicable Because the Government Must Be Neutral Toward the Religious Choices of Private Individuals.

In citing decisions allowing selective funding conditions, the state ignores the Religion Clause principle that the government must remain neutral toward religious choices. The fundamental standard of substantive neutrality toward religion distinguishes this case from the abortion funding decisions, on which the state primarily relies. *Maher v. Roe*, for example, permitted states to provide funds to indigent pregnant women for childbirth but not for abortion, notwithstanding the right to choose abortion

declared in *Roe v. Wade*, 403 U.S. 113 (1973). The *Maher* Court reasoned that the right in *Roe* merely

> protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.

432 U.S. at 473-74. The Court acknowledged that by selective funding "[t]he State may have made childbirth a more attractive alternative, thereby influencing the woman's decision," but it held that the state had not imposed an undue burden because "it has imposed no restriction on access to abortions that was not already there" because of a woman's indigency. *Id.* at 474. *Rust v. Sullivan* follows and quotes this precise reasoning, in holding that the government could prohibit federally funded family-planning programs from engaging in abortion counseling or referrals. 500 U.S. at 192-93 (quoting *Maher*, 432 U.S. at 474).

The principle that the government may disfavor abortion compared with childbirth, so long as it imposes no "undue burden" on the decision to abort, was confirmed in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). The decisive opinion in *Casey* reemphasized that "'[t]he Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth.'" *Id.* at 872-73 (quoting *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 511 (1989)). Accordingly, *Casey* upheld various regulations on abortion that did not create a "substantial obstacle" to a woman's decision to abort a nonviable fetus. *Id.* at 876-77 (plurality opinion) (citing, *inter alia*, *Maher*, 432 U.S. at 473).

In this respect, religious freedom is quite different from abortion rights. The state must be neutral on religious questions; it may not express preferences about religion of the sort it expresses about abortion and childbirth. As discussed in part II.A., the Religion Clauses

require the government to maintain neutrality toward religion, in the sense of neither encouraging nor discouraging individuals' choices in religious matters. Substituting religious references in the Court's statements about abortion would make those statements plainly untrue as a matter of law. The state has no power "to make a value judgment favoring [nonreligion] over [religion], and to implement that judgment by the allocation of public funds." *Cf. Maher*, 432 U.S. at 473-74. It has no authority to "make [secular private schools] a more attractive alternative, thereby influencing the [student's] decision." *Cf. id.* at 474. It has no power, "pursuant to democratic processes, [to] expres[s] a preference for [nonreligion over religion]." *Cf. Casey*, 505 U.S. at 872-73. The aim of religious freedom is that the government stay out of the people's religious choices, not that it influence or manipulate religious choices up to a point just short of imposing "undue burdens." Washington's exclusion plainly discourages students from majoring in theology and unjustifiably involves the state in religious decisions, as we showed in part II.A.

Rust v. Sullivan was also decided on the basis that the government can define the scope of its own messages, whether it sends those messages itself or subsidizes private speakers to send them. In *Rosenberger*, the Court made clear that *Rust* stands for the proposition that "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. . . . When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." *Rosenberger*, 515 U.S. at 833 (citing *Rust*, 500 U.S. at 194, 196-200). More recently, the Court reemphasized that "we have explained *Rust* on th[e] understanding . . . that viewpoint-based funding distinctions can be sustained in instances in which the government is itself the speaker, or instances, like *Rust*, in which the government 'used private speakers to transmit specific information pertaining to its own program.'" *Legal Servs. Corp. v.*

Velazquez, 531 U.S. 533, 541 (2001) (quoting *Rosenberger*, 515 U.S. at 833).

The Court again relied on this reasoning in *United States v. American Library Ass'n*, 123 S. Ct. 2297, 2307-08 (2003). Governments do not endorse every publication in their libraries, but neither do libraries attempt to neutrally collect everything that is printed. They necessarily choose "material of requisite and appropriate quality for educational and informational purposes." *Id.* at 2308 (plurality opinion). Implicit in this judgment is our other point – government need not be neutral towards pornography. Government cannot suppress pornography in private hands, but "libraries have traditionally excluded pornographic material from their other collections," *id.*, and certainly public schools could teach children that pornography is best avoided. Schools plainly could not teach children that religion is best avoided. As in *Rust*, *American Library* involved a government to some extent selecting its own messages, in the context of a constitutional right that does not require complete neutrality.

This case clearly involves private speech rather than the government's. Given the wide range of eligible degrees and institutions, Promise Scholarships are not "a subsidy for specified ends"; they are "designed to facilitate private speech, not to promote a governmental message." *Velazquez*, 531 U.S. at 543, 542 (distinguishing *Rust*). The state's interest is in an educated citizenry; except for the exclusion at issue, it has demonstrated no interest in particular viewpoints or subjects of study. *Rust* distinguished the government's specific policy choice at issue there from the case of "a general law singling out a disfavored group on the basis of speech content" (500 U.S. at 194) – and the latter is precisely what the state does when it permits scholarships for every accredited major except theology taught from a devotional perspective. Because this case involves wide-ranging private speech rather than a "specified" government message, the restriction on viewpoint discrimination applies fully.

B. Denying Davey's Scholarship Goes Beyond Not Funding Religion; It Penalizes Him for the Exercise of His First Amendment Rights.

Even assuming that the state can favor nonreligious over religious courses by refusing to fund the latter, the denial of scholarships to students like Davey is still unconstitutional. By excluding Davey from a scholarship, the state does not merely refuse to fund religious instruction. It goes further and imposes an independent penalty on his religious choice, by denying him scholarship aid for secular courses – aid to which he would otherwise be entitled – because he chooses to pursue a theology major taught from a religious perspective. This subjects Davey to an unconstitutional condition.

Rust v. Sullivan distinguishes unconstitutional conditions from mere refusals to fund: "Our 'unconstitutional conditions' cases involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." 500 U.S. at 197 (emphasis in original). Likewise, *Regan*, 461 U.S. 540, the state's other chief citation, distinguishes between government "merely refus[ing] to pay" for an activity, and government "deny[ing] any independent benefit" because the beneficiary engages in the activity. *Id.* at 545.

A key factor in this distinction is whether the recipient can, in realistic terms, pursue his constitutionally protected activities in a separate program. The Court in *FCC v. League of Women Voters*, 468 U.S. 364 (1984), struck down a federal law barring federally funded radio and TV stations from editorializing. Because the law provided no effective way for the station to "segregate its activities according to the source of its funding," it effectively meant that a "station that receives only 1% of its overall income from [federal] grants is barred absolutely from all editorializing." *Id.* at 400. By contrast, in *Rust* it

was crucial that family-planning agencies could realistically engage in abortion counseling and referral in separate programs outside the federally funded project. 500 U.S. at 198. And in *Regan*, which upheld the condition that tax-exempt organizations not engage in lobbying, it was crucial that the exempt organization could create a separate § 501(c)(4) entity for lobbying and maintain deductibility for contributions to its § 501(c)(3) entity. 461 U.S. at 544-46. The Court specifically noted that the requirements for separating the two entities were "not unduly burdensome" and there was no showing that the plaintiff "was unable to operate with the dual structure." *Id.* at 544 n.6.[3]

Withdrawing Davey's scholarship goes beyond refusing to fund religion and "den[ies an] independent benefit" by withdrawing aid for Davey's entire education. Davey took numerous courses for which he would have received scholarship support had he not declared theology as a major. All theology majors take core courses in subjects such as English and math (J.A. 148-49). But the penalty on choosing a theology major is particularly clear in Davey's case. He proposed to double major in business administration and theology. He lost funding for his business administration degree solely because he also chose to major in theology at Northwest. The Washington exclusion is so broad – covering the entire "school where the scholarship is used" (Pet. Br. at 25) – that Davey could not pursue a non-theology degree at Northwest College even in an entirely separate program from his theology degree, with no overlap in faculty, classroom space, or other features.

[3] *See also American Library Ass'n*. There the Court emphasized "the ease with which patrons may have the filtering software disabled," 123 S. Ct. at 2306, which limited the effect of the funding condition on other, constitutionally protected speech viewed by adults. *Accord id.* at 2310 (Kennedy, J., concurring in the judgment); *id.* at 2312 (Breyer, J., concurring in the judgment).

The state's answer, apparently offered for the first time in this Court, is that a student such as Davey could use the Promise Scholarship for the non-theology major at Northwest, and then "simultaneously us[e] his own money to pursue a theology degree in a separate program at a second school." Pet. Br. at 25. This is obviously no answer whatever. The state proposes that the student pay close to two full-time tuitions simultaneously[4] and bear the serious inconvenience of attending two full-time programs at potentially distant campuses. Alternatively, the state suggests that the student pursue each degree half-time (see Pet. Br. at 12) – and therefore, of course, take twice as long to finish college. Either course is so "unduly burden[some]" (*Regan*, *supra*) that the condition "effectively prohibit[s] the recipient from engaging in [a theology degree] outside the scope of the [state] funded program" (*Rust*, 500 U.S. at 197). Discrimination that forces a student to attend a different college or university is a constitutionally cognizable burden, as this Court held in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723-24 n.8 (1982) (female-only admissions policy at state nursing school "[w]ithout question . . . worked to [male applicant's] disadvantage" by forcing him to drive "a considerable distance from his home" to coeducational state nursing school and to forego jobs that he could have had closer to home).

But the burden does not stop at inconvenience. To devout students preparing for the ministry, theology degrees are not fungible items. There is no guarantee – indeed, it may be less than likely – that Davey will find another theology program that he can realistically attend and that fits his doctrinal beliefs and his particular goals for his ministry career. If Davey instead chooses Northwest College for theology, he may not find a Washington

[4] The Promise Scholarship's yearly maximum of approximately $1,500 covers only a small percentage of tuition at most colleges, especially private ones.

college that he can attend that teaches business courses in an evangelical Christian context as Northwest does. Either way, the rigid terms of Washington's exclusion cause Davey and students like him not only a severe practical burden, but also a serious risk that their conscientious choice of religious education will be frustrated.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

STATEMENTS OF INTEREST OF AMICI CURIAE

The **Council for Christian Colleges & Universities**, founded in 1976, is an educational association of more than 120 Christian colleges and universities in 31 states and nearly 30 international institutions representing 17 nations. CCCU campuses, which reflect more than 30 different religious traditions and denominations, enroll well over 200,000 students. The Council coordinates professional development opportunities for administrators and faculty and manages ten off-campus student programs. A critical mission of the CCCU is to provide public advocacy for religiously affiliated higher education.

The **Association of Catholic Colleges & Universities**, with over 200 member institutions, promotes Catholic higher education by supporting its member institutions, especially with reference to their Catholic mission and character and to serve as The Voice of Catholic Higher Education in the United States. Through research, collecting and coordinating data, publications, and conferences, ACCU encourages and facilitates sharing of ideas and cooperative efforts among its member institutions. ACCU's journal, *Current Issues in Catholic Higher Education*, is published semi-annually, and its electronic newsletter, *Update*, quarterly. Contact with the Catholic hierarchy is through the United States Conference of Catholic Bishops joint Bishops and Presidents Committee, and the Congregation for Catholic Education of the Holy See. The Association also represents its members to the American Catholic Community at large.

The **Association of Southern Baptist Colleges & Schools**, with 54 members in 19 states, serves and promotes its member schools through such avenues as its web site, printed materials and ongoing programs and services. ASBCS member schools include 49 colleges and universities, 2 Bible colleges and 3 academies.

The **Center for Public Justice** is a national, public policy and civic-education organization that advocates the equal treatment of all faiths in the public square. For 25 years the Center has been advancing the case for the free exercise and non-establishment of religion in public life as well as in private life.

Family Research Council is a District of Columbia non-profit corporation which advocates on behalf of the American family, and which is committed to defending the freedom of religious expression in the United States. Family Research Council's interest in this case is based on its twenty-year history of advocating for free expression of religious belief and the abolition of discrimination against religious practice. Family Research Council contends that the actions of the State of Washington, denying Mr. Davey the scholarship which ne had qualified to receive, amounted to targeted censorship, aimed at banning certain viewpoints, and preventing state funding of faith-based courses. Family Research Council publishes monographs, books, pamphlets, and other literature designed to promote and strengthen the freedom and practice of religion. It broadcasts a radio program which informs listeners of topics and concerns which affect religious freedom and expression. And it advocates actively for the adoption of legislation which will promote religious freedom and expression.

Focus on the Family is a California non-profit religious corporation committed to strengthening the family in the United States and abroad. Focus on the Family's interest in this case stems from the fact that it is actively involved in the promotion of the freedom of religion and actively opposes viewpoint discrimination and restriction on the exercise of religious freedom. Focus on the Family contends that the actions of the State of Washington, denying Mr. Davey the scholarship which he had qualified to receive, based solely upon his religious viewpoint and practice, amounts to viewpoint discrimination prohibited by the Constitution. Focus on the Family distributes a daily radio broadcast about family issues that reaches approximately 1.7 million listeners each day in the United States, Canada and around the world. Focus on the Family publishes and distributes *Focus on the Family* magazine and other literature that is received by more than 2 million households each month. Topics addressed in the daily radio broadcast and in printed literature published and distributed by Focus on the Family frequently concern religious expression, freedom of speech, and the right of individuals, privately, to express their opinions, whether religious or otherwise.

The **Christian Legal Society**, founded in 1961, is a nonprofit interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and at over 140 accredited law schools. Since 1975, the Society's legal advocacy and information division, the Center for Law and Religious Freedom, has worked for the protection of religious belief and practice, as well as for the autonomy from the government of religion and religious organizations, in the

Supreme Court of the United States and in state and federal courts throughout this nation.

The Center strives to preserve religious freedom in order that men and women might be free to do God's will. Using a network of volunteer attorneys and law professors, the Center provides information to the public and the political branches of government concerning the interrelation of law and religion. Since 1980, the Center has filed briefs amicus curiae in defense of individuals, Christian and non-Christian, and on behalf of religious organizations in virtually every case before the Supreme Court involving church/state relations.

The Society is committed to religious liberty because the founding instrument of this Nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive, Declaration of Independence (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which is religious liberty. The right sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our Nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its full and free exercise. Hence, the unequivocal and non-negotiable prohibition attached to

this, our First Freedom, is "Congress shall make no law. . . ."

The Christian Legal Society's national membership, years of experience, and available professional resources enable it to speak with authority upon religious freedom matters before this Court.

No. 02-1315

Supreme Court, U.S.
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SEP 8 - 2003
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IN THE

Supreme Court of the United States

GARY LOCKE, GOVERNOR OF WASHINGTON, *et al.*,
Petitioners,

v.

JOSHUA DAVEY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*[1]

The National Jewish Commission on Law and Public Affairs ("COLPA") is an organization of volunteer lawyers

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[1] No person, organization or corporation other than the *amicus* and the organizations named herein have assisted in or contributed to the preparation of this brief. The parties have consented to the filing of this brief.

that advocates the position of the Orthodox Jewish community on legal issues affecting religious rights and liberties in the United States. COLPA has consistently supported the principle of fair and even-handed treatment for students who attend Jewish and other religious schools. Over the past 35 years, since *Board of Education* v. *Allen*, 392 U.S. 236 (1968), COLPA has filed *amicus* briefs in nearly all cases considered by this Court involving government assistance to students attending religious educational institutions and in many other cases involving the constitutional provisions regarding freedom of religion.[2]

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[2] *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Good News Club v. Milford Cent. School*, 533 U.S. 98 (2001); *Mitchell v. Helms*, 530 U.S. 793 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Agostini v. Felton*, 521 U.S. 203 (1997); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Lee v. Weisman*, 505 U.S. 577 (1992); *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987); *Local No. 93, Intern. Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501 (1986); *Ohio Civil Rights Com'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986); *School Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Aguilar v. Felton*, 473 U.S. 402 (1985); *Mueller v. Allen*, 463 U.S. 388 (1983); *Bob Jones University v. United States*, 461 U.S. 574 (1983); *Widmar v. Vincent*, 454 U.S. 263 (1981); *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979); *Regents of University of California v. Bakke*, 438 U.S. 265 (1978); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977); *Committee for Public Ed. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Dewey v. Reynolds Metals Co.*, 402 U.S 689 (1971); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Walz v. Tax Commission of City of New York*, 397 U.S. 664 (1970); *Board of Ed. of Central School Dist. No. 1 v. Allen*, 392 U.S. 236 (1968).

COLPA submits this *amicus* brief on behalf of, and is joined by, the following seven national Orthodox Jewish organizations:

- Agudas Harabonim of the United States and Canada is the oldest Orthodox rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Jewish community.

- Agudath Israel of America is the nation's largest grassroots Orthodox Jewish organization, with chapters in 36 states and over 50 cities throughout the United States. One of its functions is to serve as an advocate for the cause of Jewish schools and Jewish education.

- National Council of Young Israel is a coordinating body for more than 300 Orthodox synagogue branches in the United States and Israel. It is involved in matters of social and legal significance to the Orthodox Jewish community.

- The Rabbinical Alliance of America is an Orthodox Jewish rabbinical organization with more than 400 members. It has for many years been involved in a variety of religious, social and educational areas affecting Orthodox Jews.

• The Rabbinical Council of America is the largest Orthodox Jewish rabbinical organization in the world. Its membership exceeds one thousand rabbis, and it is deeply concerned with issues related to religious freedom.

• Torah Umesorah-The National Society for Hebrew Day Schools is the coordinating body for more than 600 Jewish day schools across the United States and Canada.

• The Union of Orthodox Jewish Congregations of America (the "U.O.J.C.A.") is the largest Orthodox Jewish synagogue organization in North America, representing nearly one thousand congregations. Through its Institute for Public Affairs, the U.O.J.C.A. represents the interests of its national constituency on public policy issues.

Each of these organizations subscribes to the view that American society is best served when religion is allowed to flourish, and that attempts to maintain an impregnable "wall of separation" between church and state — such as is embodied in State "Blaine Amendments" — results in government hostility to religion and discrimination against people of faith.

As observant Jews, we know all too well the dangers and the consequences of government-sanctioned hostility to religious practices. We are particularly concerned when that hostility is directed, as in the case now before this Court, at religious learning and study. For Orthodox Jews, intensive daily study of the Torah, the Talmud, the Code of Jewish Law, and other works that expound on these basic texts is an essential component of our religious observance. The centrality of Torah study is emphasized repeatedly in the Jewish religious tradition. Thousands of students pursue

Jewish religious tradition. Thousands of students pursue advanced religious Torah studies in post-secondary institutions of higher Jewish learning while receiving college-level educations that equip them for contemporary life as professionals or other wage-earners in modern society.

Students enrolled in such institutions should not be disadvantaged in comparison with their peers enrolled in non-sectarian schools. Yet State "Blaine Amendments," which originally passed during a wave of anti-Catholic xenophobia, may be used today to block government assistance to college students who also attend religious educational institutions.

We acknowledge that the Establishment Clause imposes limits on direct government financial aid to religious schools. But the Blaine Amendments go further if they are interpreted to deny aid to students who are studying secular subjects merely because, at the same time, they intensively study religion from a religious perspective at religious institutions. In the case before the Court, for example, Washington State entitles qualified students pursuing all forms of study to receive Promise Scholarships. Only students who take their religion seriously enough to devote a significant portion of their college education to the pursuit of religious study in a religious setting are disqualified.

Disqualifying students seeking to pursue religious studies – no matter what else they may be studying simultaneously – constitutes a degree of hostility to religion that is unconstitutional under authoritative rulings of this Court. The Court should affirm the decision below and invalidate discrimination against religious observance and religious study of the kind demonstrated by Washington's statute and practice.

ARGUMENT

INTRODUCTION

This case concerns the constitutionality, under the Free Exercise Clause, of a state law that prohibits a State from providing financial assistance to an otherwise qualified college student because that student "is pursuing a degree in theology." Wash. Rev. Code § 28B.10.814. The Washington State authorities have interpreted this statute to apply only to students who study theology "from a religious perspective."

This disqualification is unconstitutional because it is "restrictive of religious practice" and discriminates against conduct "because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520, 532, 546 (1993). A college student who takes his religious beliefs seriously enough that he pursues "a degree in theology" at a school that is accredited by the State suffers discrimination on account of his religious observance if the State refuses to provide to him the same financial assistance that it provides to other objectively qualified students who pursue a degree in history, languages, sciences, or mathematics.

The discrimination is particularly severe as it applies to religiously observant Jewish college students. Our religious beliefs command us to study religious teachings – *i.e.,* to pursue the study of theology "from a religious perspective" – in addition to whatever secular studies we may pursue in order to earn a livelihood. If the challenged Washington statute is taken literally, Jewish college students who spend a significant portion of their average day studying the Talmud and Jewish Codes – as they are obligated to do by their religious convictions – become ineligible, on account of this dedication to religious observance, for the

governmental scholarship assistance that is provided to contemporaries who are no more qualified, but who lack equal dedication to religious practice. The existence of this rule also inhibits Jewish college students who believe that their religious obligations include intensive study of the Torah, the Talmud, and the Codes of Jewish Law. If intense religious study results in ineligibility for a state-funded scholarship grant, students will be deterred from engaging in study required by religious convictions.

The effect of the Washington State statute that disqualifies any student who is "pursuing a degree in theology" from receiving a Promise Scholarship is equivalent, in a constitutional sense, to a disqualification of any student who wears a yarmulke, or any student who eats only food prescribed by religious dietary laws, or any student who observes Saturdays as the Sabbath. It removes a student who is otherwise fully qualified and eligible for personal financial assistance from the roster of eligible students exclusively because he or she takes his or her religion seriously. That form of discrimination violates the Free Exercise Clause of the United States Constitution and cannot be justified by a purported policy of Washington State to erect a higher "Wall of Separation" between Church and State than is provided by the Establishment Clause.

I

THE WASHINGTON STATUTE IS A DISQUALIFICATION LAW, NOT A LIMITATION ON EXPENDITURE OF STATE FUNDS

Notwithstanding assertions repeatedly made in the Petitioners' Brief and in the briefs of *amici* supporting the petitioners, the statute at issue in this case is not truly a

limitation on the disbursement of state funds for religious instruction. Section 28B.10.814 of the Washington Revised Code is not cast as a prohibition against expending funds for a defined purpose. It disallows state aid "to any student" pursuing the defined course of study. Washington State's Promise Scholarship does not pay any teacher, whether he be a teacher of religion or any other subject. Nor does it purchase any book or instructional aid.

The Promise Scholarship is an annual grant to graduates of Washington high schools who have outstanding academic records, who have achieved high scores on standardized objective pre-college examinations, and whose families have economic need for financial assistance during their dependents' college years. It is a grant made *to a student*, not a purchase of services or goods.

Students who qualify under objective criteria and choose to attend public or nationally accredited colleges located in the State of Washington receive, through their colleges, one or two *personal* annual state-funded payments of $1125 to $1542 that the eligible students may use as they see fit. The funds may be used for a student's room or board, for transportation, or for any other academically related purpose. A student may also, if he or she chooses, apply the funds to tuition, but the choice is entirely up to the student.

Washington State law prescribes only two additional qualifications: (1) The student must be enrolled in college at least half-time. (2) The student may not be "pursuing a degree in theology."

At issue in this case is the second of these statutory criteria. In the context of the Promise Scholarship Program, it is plain that the "pursuing a degree in theology" provision

is simply a disqualification of certain otherwise qualified students such as the respondent in this case.

It makes no difference under the "theology" disqualification how many classes other than theology classes are being taken by the qualified student. Nor does it make any difference if the otherwise qualified student is "pursuing" degrees in other subjects in addition to theology – as the respondent in this case was actually doing. And the State of Washington does not care how the student chooses to spend the grant given him or her by the State. The student becomes ineligible for the grant simply because he or she is "pursuing a degree in theology."

II

THE INTENSIVE STUDY OF RELIGIOUS TEXTS FROM A RELIGIOUS PERSPECTIVE IS A CENTRAL TENET OF JEWISH RELIGIOUS OBSERVANCE

By disqualifying a college student from a state-financed benefit because he "is pursuing a degree in theology" from a religious perspective, the State of Washington effectively discriminates against Jewish college students who, as part of their religious observance, must study religious texts intensively. By religious tradition, such concentrated study should ideally result in the student's achievement of a level of expertise that would be the equivalent of what is required to qualify as a teacher and rabbi. Jewish college students who take their religious duties seriously often combine sustained Torah study which culminates with rabbinic ordination or its equivalent with a secular college program. If the religious education renders

them ineligible for a state-financed personal scholarship program during their college years, these students are being singled out for discriminatory treatment merely because of their religious observance.

The *Encyclopedia Judaica* begins its description of the Jewish religious duty to study religious texts from a religious perspective: "The study of the Torah (*talmud Torah*) as a supreme religious duty is one of the most typical and far-reaching ideas of rabbinic Judaism. Talmudic literature is full of references to the *mitzvah* [commandment] of Torah study, especially of the difficult halakhic portions which require the fullest application." 15 *Encyclopedia Judaica*, "Study" 453 (1971). The historical aspect of this religious duty is described as follows: "The ideal of Torah study as a lifelong pursuit incumbent upon all Jews found ample concretization in the course of Jewish history." *Id.* at 458. "Dedicated students, 'toiling in the Torah,' were found to number in the thousands in the great Palestinian and Babylonian academies during the first five centuries of the present era." *Id.* at 453.

Maimonides, the great twelfth century Codifier of Jewish Law, summarized the religious obligation as follows in Chapter 1 of "The Laws Concerning the Study of the Torah" in his classic work *Mishneh Torah,* Book One:

> (8) Every Israelite is under an obligation to study Torah, whether he is poor or rich, in sound health or ailing, in the vigor of youth or very old and feeble. Even a man so poor that he is maintained by charity or goes begging from door to door, as also a man with a wife and children to support, is under the obligation to set aside a definite period during the day and at night for the study of the

> Torah, as it is said, "But you shall meditate therein day and night" (Joshua 1:8).
>
> * * * * *
>
> (10) Until what period in life ought one to study Torah? Until the day of one's death, as it is said, "And lest they [the precepts] depart from your heart all the days of your life" (Deuteronomy 4:9). Whenever one ceases to study, one forgets.

Rabbi Joseph Caro, in his sixteenth century monumental codification of Jewish Law called the *Shulchan Aruch,* ruled that every Jewish male is obligated to study the Torah every day of his life. *Yoreh Deah* 246:1. Contemporary scholars have emphasized this religious obligation of the observant Jew in the modern world. For example, Dr. Norman Lamm, Chancellor and recently retired President of Yeshiva University, said:

> The study of Torah has always been accorded high significance in Judaism. The clearest formulation of this principle is given in the Mishnah: The study of Torah is equal to all the other precepts. Even more than merely "an integral part of Jewish piety," *talmud Torah* was considered an act performed by God Himself: "The Holy One, blessed be He, the King of Kings of Kings . . . one-third of the day He studies Bible and Mishnah.". . . . [T]he virtue of the study of Torah, as such, is incontestable. All of Judaism is dedicated to the importance and practice of *talmud Torah.* It raises man to the level of a priest. . . . . The reward of the righteous in the world-to-come will be further study of Torah. The study of

> Torah enhances brotherliness and is a source of consolation to those on the brink of despair. "What joy can a man find in the world? Solely in the words of the Torah." All of the *baraita Kinyan Torah*, appended to Mishnah *Avot* as the sixth chapter, is a paean of praise for the study of Torah.

Norman Lamm, Torah Lishmah: Torah for Torah's Sake (Ktav 1989), p. 102 (footnotes omitted).

A recent work by an internationally renowned Israeli rabbinic figure (who also received a Doctorate in English Literature from Harvard University) explained the modern Jew's religious duty to study religious texts intensively from a religious perspective as follows:

> *[T]almud Torah* is not merely a preliminary to observance. It is itself a *mitzvah* – indeed, one of the most basic. Torah study, ideally conceived as both an intellectual exercise and a religious experience, is imposed by the Halakhah as a universal daily obligation. Insisting that God must be served with the head as well as with the hands and the heart, [Judaism] sees intellection as an integral aspect of the religious life of every individual. It has never seen religious study as the private preserve of an ecclesiastical hierarchy or of a privileged intellectual elite. On the contrary, it posits *talmud Torah* as the duty and destiny of all. It realizes that great success in the exercise of reason as part of man's search for God cannot come to all, or even to many, but it considers this no reason for abandoning the attempt. It is precisely for the effort, the

> *process* of the *recherche*, that the Halakhah presses most insistently. Of *yedi'at Ha-Torah*, the knowledge of Torah, [rabbinic consensus] has relatively little to say; but of *talmud Torah*, they can never say enough.

Aharon Lichtenstein, Leaves of Faith: The World of Jewish Learning (Ktav 2003), pp. 90-91.

This religious obligation is not the province of rabbis and academicians alone; it is the duty of every Jew. Rabbi Meir, a leading figure of the first century Tannaitic period, is quoted in *The Ethics of the Fathers* 4:12: "Rabbi Meir said: 'Reduce your business activities and engage in Torah study. . . . If you neglect the study of Torah, you will have many excuses to neglect it. But if you labor in the Torah, you will be given much reward.'" And Rabbi Judah ben Ilai is quoted in the Talmud (*Berachot* 35b) as contrasting "earlier generations" which made the study of Torah their main concern and their livelihoods secondary with "later generations" which gave primary importance to secular concerns and secondary status to Torah study. The former, he said, prospered in both fields, whereas the latter succeeded in neither.

The result of these teachings is that many Jewish college students throughout the United States combine their secular college educations with intensive study of religious texts from a religious perspective. M. Herbert Danzger, Returning to Tradition: The Contemporary Revival of Orthodox Judaism (Yale University Press 1989), pp. 149-151, 278. Indeed, the principal author of this brief – who has argued 27 cases in this Court and written many *amicus* briefs in cases heard by the Court – received an undergraduate college education while studying six hours a day in the rabbinic school of Yeshiva University. During his college

years (1953-1957), undersigned counsel was the beneficiary of a New York State Regents Scholarship, which assisted substantially in financing counsel's undergraduate secular education. That scholarship was awarded on the basis of performance in an objective examination administered statewide. Had New York State law barred anyone pursuing a "degree in theology" from a religious perspective from receiving a New York State Regents Scholarship, the author of this brief would probably have been disqualified from receiving such a Regents Scholarship for his secular studies and might never have qualified for an undergraduate degree, proceeded to the Harvard Law School, obtained a clerkship with a Justice of this Court, and served as an Assistant to Solicitors General Archibald Cox and Thurgood Marshall. What the future holds in store for the respondent in this case is not yet known,[3] but disqualification from a financial benefit that the State of Washington is prepared to give him based on objective academic performance should not result from his conscientious adherence to religious convictions.

III

THE DISQUALIFICATION OF STUDENTS STUDYING THEOLOGY FROM A RELIGIOUS PERSPECTIVE IS NOT NEUTRAL AND IT SUPPRESSES RELIGIOUS OBSERVANCE

The challenged Washington statute fails the "neutrality inquiry" and the "general applicability" test of *Church of the Lukumi Babalu Aye v. City of Hialeah,* 508

[3] A recent article discussing this case reports that the respondent has "decided to attend Harvard Law School upon graduating from Northwest." Ryan, "The Neutrality Principle," 3 Education Next, No. 4, p. 29 (Fall 2003).

U.S. 520, 542 (1993), in at least two major respects. *First,* it disqualifies college students who are pursuing a degree in theology, as contrasted with students who are pursuing degrees in philosophy, history, mathematics, or psychology. Since the Promise Scholarship does not pay directly for a student's academic courses but may be used by the student for any academic purpose whatever, there is no legitimate policy justification for singling out "theology," as opposed to "phi'osophy" or "psychology," as a forbidden degree major. Students who are majoring in theology should be no less entitled to receive personal grants to be used for room, board, or transportation than students who are studying languages or literature. By singling out and disqualifying students who are pursuing degrees in theology, the Washington statute manifests a constitutionally impermissible hostility to religion.

Second, the exception for theology majors studying that subject "from a religious perspective" makes the challenged Washington law "selective" rather than a law "of general applicability." By declaring ineligible anyone who studies theology from a religious perspective, the law "imposes burdens only on conduct motivated by religious belief." 508 U.S. at 543. Whether theology is taught from a "secular" perspective or from a "religious" perspective would make no difference if the law were truly a statute of "general applicability." Disqualifying students because of the "religious perspective" of the instruction is a means of deterring "conduct motivated by religious belief." That is precisely what this Court's *Lukumi Babalu Aye* decision condemns. 508 U.S. at 545. It is also prohibited by this Court's earlier decision in *McDaniel v. Paty,* 435 U.S. 618 (1978), because, in the language of Justice Brennan's concurring opinion in that case, the law "imposes a unique disability upon those who exhibit a defined level of intensity

of involvement in protected religious activity." 435 U.S. at 632.

There is another constitutionally impermissible consequence of the challenged Washington law. It has the serious effect of inhibiting and deterring religious observance. A college student who has won a Promise Scholarship and whose family cannot easily afford his or her secular college education is encouraged by this law to reduce his or her contemporaneous study of religious texts and other forms of "theology" lest the quantity of such study result in disqualification from the program. Hence there is a direct correlation between the statute and the student's adherence to religious observance. A Jewish college student who might otherwise wish to pursue the kind of intensive Torah study that could ultimately lead to rabbinic ordination – a positive commandment under Jewish Law – would hesitate and possibly avoid concentrated religious study in order not to jeopardize the financial assistance he has been awarded.

IV

NEITHER WASHINGTON'S "BLAINE AMENDMENT" NOR A "PLAY IN THE JOINTS" THEORY SUSTAINS THE RELIGIOUSLY DISCRIMINATORY STATUTE

The State seeks to rescue its statute despite its patently discriminatory purpose and effect by invoking the provision of Washington's constitution that prohibits the appropriation or application of any "public money or property . . . to any religious worship, exercise or instruction." Washington Constitution, art. I, section 11. This provision does not appear to be literally applicable to the

Promise Scholarship because, as we have noted, scholarship funds do not pay any religious teacher or purchase any religious book. Assuming, *arguendo*, however that the "Blaine Amendment" would prohibit the grant of a Promise Scholarship to the respondent because he is pursuing a degree in theology from a religious perspective, that state constitutional provision could not trump the command of the Free Exercise Clause.

Similar claims that granting equality to religious observance or speech might violate a state policy of non-establishment of religion have been rejected in cases involving access to governmentally owned property. See *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). This Court made it clear in the *Good News Club* case that a restriction that singles out religious expression can be justified by the State only if it is actually necessary to avoid violating the Establishment Clause. 533 U.S. at 112-120. If there is no actual violation of the Establishment Clause, the mere perception that a non-establishment principle might be violated is insufficient to sustain a discriminatory denial of religious expression. In the present case, the petitioners concede that permitting the respondent to qualify for a Promise Scholarship would not violate the Establishment Clause of the First Amendment to the United States Constitution. Brief for the Petitioners, pp. 4, 43. It follows, therefore, that the Blaine Amendment – which, as interpreted here, goes well beyond the Establishment Clause – cannot justify the disqualification of the respondent.

Nor does the "play in the joints" concept urged forcefully by some *amici* – including the American Jewish Congress – save Washington's discriminatory policy. It is ironic that the very same organization that adamantly

opposed the concept that local governments should be entitled to "play in the joints" that would permit greater leeway under the Religion Clauses in the 1970's and 1980's – when a majority of this Court was invalidating different forms of governmental financial assistance for education in religious schools[4] – is now claiming that federalism grants discretion to States to forbid student aid protected by the federal Constitution. In any event, "play in the joints" is not a constitutional license to harm devout religious believers such as respondent and to deny to him, in violation of the Free Exercise Clause, the same benefits that he would have if he were not motivated by conscientious convictions.

The authorization Washington is seeking – to permit its local legislature to experiment with the respondent's constitutionally protected rights – is comparable to the leeway that the State of Texas was requesting in *Lawrence v. Texas,* 123 S. Ct. 2472 (2003), in order to enforce local morals and standards of conduct. This Court held that the United States Constitution did not permit Texas to restrict sexual freedom in this manner. The Court said (123 S. Ct. at 2475):

> Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.

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[4] *E.g., Committee for Public Ed. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Aguilar v. Felton*, 473 U.S. 402 (1985); *School Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985).

The constitutional right of the respondent in this case to pursue a college education consistently with his religious convictions without forfeiting the financial assistance that the State of Washington has awarded to him is surely part of the "autonomy of self that includes freedom of thought, belief, [and] expression." The "transcendent dimensions" of the liberty to observe the doctrines of one's faith are entitled to no less respect than the equivalent dimensions of the "certain intimate conduct" at issue in *Lawrence.*

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

September 2003

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In The Supreme Court of the United States

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, et al.,
Petitioners,

v.

JOSHUA DAVEY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE STATE OF FLORIDA, THE HONORABLE JOHN ELLIS "JEB" BUSH, GOVERNOR, AND THE FLORIDA DEPARTMENT OF EDUCATION, AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICI

Amici the State of Florida, Florida Governor Jeb Bush and the Florida Department of Education share a strong commitment to protecting religious liberty and to respecting the religious pluralism of the people of the State of Florida. Amici thus have an interest in ensuring that individuals are not excluded from otherwise available government benefit programs solely on the basis of religion.

Amici also have an interest in this case because of pending litigation over Florida's Opportunity Scholarship Program ("OSP"), enacted in 1999 as part of a comprehensive education reform package. The OSP provides scholarships to students in failing schools and allows them to use their scholarships at any eligible public or private school. The OSP's school eligibility criteria make no distinction between secular and religious private schools.

Raising claims under the constitutions of both Florida and the United States, various interest groups and individuals challenged the OSP shortly after it went into effect. The plaintiffs abandoned their federal Establishment Clause claim after this Court issued its decision in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

Nonetheless, a Florida trial court ultimately held that, by allowing students to spend their scholarship funds at religious schools, the OSP violates Article I, section 3 of the Florida Constitution ("Article I, section 3"). *See Holmes v. Bush*, No. CV 99-3370, 2002 WL 1809079 (Fla. Cir. Ct. Aug. 5, 2002). In relevant part, Article I, section 3 provides: "No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian

institution." An appeal of this decision is currently pending before a state district court of appeal.

Amici have argued in the appeal that the trial court failed to apply Florida Supreme Court case law holding that Article I, section 3 is not violated when religious institutions incidentally benefit from a neutral program that is of general applicability and has a secular purpose. *See, e.g., Johnson v. Presbyterian Homes of Synod, Inc.*, 239 So. 2d 256 (Fla. 1970). Rather than follow controlling precedent, the trial court adopted an interpretation of Article I, section 3 that jeopardizes numerous other Florida social programs, including the McKay Scholarship program. That program allows over ten thousand students with disabilities to attend private schools of their parents' choice.

Amici have further argued in the appeal that the trial court's construction of Article I, section 3 unnecessarily creates a conflict between the Florida Constitution and the U.S. Constitution. Specifically, the trial court read the Florida Constitution as requiring the state to violate the U.S. Constitution by discriminating against students who would choose to spend their Opportunity Scholarships in pursuit of a religious education.

Amici thus have a significant interest in this Court's clarification of whether a state scholarship program that funds both public and private education may, consistent with the U.S. Constitution, exclude those students who choose a private religious education.

SUMMARY OF ARGUMENT

The Free Exercise and Establishment Clauses together mandate government neutrality toward religion. Washington's scholarship program violates this neutrality mandate in two ways. First, the program uses a religious classification as a basis for the denial of an otherwise available government benefit by excluding students who choose to major in theology. Second, the program evinces hostility toward religion and stigmatizes students who choose to engage in religious inquiry by funding literally every course of study other than theology. The program's express reliance on a religious classification to deny a government benefit distinguishes this case from those in which this Court has upheld government programs that, for reasons having nothing to do with religion, declined to fund constitutionally protected activities. The program's use of a religious classification also distinguishes this case from those involving the Court's review of neutral laws of general applicability that only incidentally affected religious adherents.

The Promise Scholarship program's exclusion of students who choose to major in theology also violates the viewpoint neutrality requirement imposed by the Free Speech Clause. Applying the limited public forum doctrine, this Court has repeatedly held that government may not deny religious speakers access to otherwise available facilities. Significantly, in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), the Court invoked limited public forum principles to invalidate a state university policy that excluded religious publications from an otherwise available *funding* program. The Promise Scholarship program is constitutionally indistinguishable from the program that the Court in *Rosenberger* found unconstitutional. The First Amendment equally protects freedom of speech and freedom to learn, and the government has no legitimate interest in discriminating on the basis of religious viewpoint in either context. For the same

reasons that government may not deny religious speakers access to otherwise available facilities and funds, it also may not exclude an otherwise eligible student from a state-funded scholarship program solely on the basis of the student's choice to pursue a religious education.

ARGUMENT

I. THE PROMISE SCHOLARSHIP PROGRAM VIOLATES THE NEUTRALITY REQUIREMENT IMPOSED BY THE FREE EXERCISE AND ESTABLISHMENT CLAUSES.

A. The Religion Clauses Jointly Mandate Government Neutrality Toward Religion.

"The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97, 103 (1968). This neutrality requirement is derived from both the Establishment Clause and the Free Exercise Clause. *See Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973) ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion."). The neutrality principle so informs this Court's jurisprudence that the Court has invoked it to explain the constitutional requirement that government, in rare cases, may exempt a religious adherent from a law of general applicability. *See Sherbert v. Verner*, 374 U.S. 398, 409 (1963) (constitutionally-required accommodation "reflects nothing more than the governmental obligation of neutrality in the face of religious differences").

The neutrality requirement leads to two subsidiary principles, both of which are offended by Washington's Promise Scholarship program. The first is that, "[b]eyond [the] limited situations in which government may take cognizance of religion for purposes of accommodating our traditions of religious liberty, government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits." *McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring). Consistent with this principle, a basic tenet of this Court's Free Exercise Clause jurisprudence is that "government may not . . . impose special disabilities on the basis of religious views or religious status." *See also Employment Div. v. Smith*, 494 U.S. 872, 877 (1990). When the government does take action based on a religious classification, its action is subject to strict scrutiny. *See id.* at 886 n.3. And "[a] law that targets religious conduct for distinctive treatment . . . will survive strict scrutiny only in rare cases." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

The second principle, which is derived primarily from this Court's Establishment Clause jurisprudence, is that government may not take actions that, in purpose or effect, either endorse or disapprove of religion. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring). "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." *Id.* at 688 (O'Connor, J., concurring). To be sure, most of this Court's cases interpreting the Establishment Clause have presented the question whether government action has impermissibly favored religion. But this Court's jurisprudence leaves no doubt that the Establishment Clause equally forbids governmental disapproval of or hostility toward religion. *See, e.g., Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) ("State power is no more to be used so as to handicap

religions, than it is to favor them."); *Edwards v. Aguillard*, 482 U.S. 578, 616 (1987) (Scalia, J., dissenting) ("[W]e have consistently described the Establishment Clause as forbidding not only state action motivated by the desire to *advance* religion, but also that intended to 'disapprove,' 'inhibit,' or evince 'hostility' toward religion"); *Wallace v. Jaffree*, 472 U.S. 38, 85 (1985) (Burger, C.J., dissenting) ("For decades our opinions have stated that hostility toward any religion or toward all religions is as much forbidden by the Constitution as is an official establishment of religion.").

B. The Promise Scholarship Program Violates The Neutrality Requirement Imposed By The Religion Clauses.

Washington's Promise Scholarship program violates both of the subsidiary principles of neutrality. First, it denies students access to an otherwise available government benefit solely on the basis of a religious classification. Washington's program expressly defines its beneficiaries in reference to religion. Eligible students may choose literally any course of study other than theology, which for purposes of Washington law means "that category of instruction that resembles worship and manifests a devotion to religion and religious principles in thought, feeling, belief, and conduct." *Calvary Bible Presbyterian Church v. Bd. of Regents*, 436 P.2d 189, 193 (Wash. 1967). Among otherwise eligible students, only those who choose to major in theology are denied a scholarship. Put differently, Washington withholds its subsidy unless and until a student is willing to pursue a secular major. As long as a student remains within a class defined in reference to religion—those students who choose to major in theology—he or she will be denied the scholarship. The neutrality requirement mandated by the Religion Clauses forbids a state from so using a religious classification to deny an otherwise eligible student a government benefit.

Second, by singling out students who major in theology for disfavored treatment, Washington's program conveys a message of governmental hostility toward religion. To an objective observer, a policy that subsidizes *every* course of study other than theology necessarily stigmatizes religious inquiry and those who wish to engage in it. This Court in other contexts has not hesitated to draw the conclusion that religion-based exclusions from otherwise neutral benefit programs signal hostility toward religion. For example, in *Rosenberger*, this Court observed that a state university's discriminatory refusal to fund a religious publication "would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." 515 U.S. at 845-46. Similarly, a plurality of the Court in *Board of Education v. Mergens*, 496 U.S. 226, 248 (1990), noted that, "if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." Using a religious classification as a basis for exclusion from an otherwise available benefit program communicates a message of hostility to religion even if the state's motivation for enacting the discriminatory policy—to accomplish a strict separation of church and state—is benign. *See, e.g., Lynch*, 465 U.S. at 690 (O'Connor, J., concurring) (to determine whether government message endorses or disapproves of religion, Court must consider objective effect of message in the community). A state cannot, consistent with the neutrality requirement, adopt a policy that has the objective effect of stigmatizing students who choose a religious education.

C. The Promise Scholarship Program Fails Strict Scrutiny Review.

Because it employs a religious classification to deny an otherwise available government benefit, the Promise Scholarship program is subject to strict scrutiny. *See Smith*, 494 U.S. at 886 n.3. Tellingly, Washington does not even argue that its policy could pass that test. The reason is that such an argument is precluded by this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981). In that case, the Court found that a state university violated the Free Speech Clause by excluding a religious group from an otherwise open forum. In defense of its discriminatory policy, the state had asserted an interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution." *Id.* at 277. The Court nonetheless concluded that the university's policy failed strict scrutiny review because the state's interest was "limited by the Free Exercise Clause and . . . by the Free Speech Clause as well." *Id.* at 277-78. Similarly, Washington's interest in pursuing its policy of separation of church and state is insufficient to justify the Promise Scholarship's discrimination against students who choose to major in theology.

The religious liberty guaranteed by the First Amendment is entitled to full protection against encroachment by state law. State policies involving religion need not be uniform, but they must at a minimum respect the neutrality and non-discrimination principles mandated by the Religion Clauses of the U.S. Constitution. State laws that discriminate on the basis of religion should fare no better before this Court than laws that discriminate on other grounds that are constitutionally impermissible. *Cf. Board of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring) ("This emphasis on equal treatment is, I think, an eminently sound approach. In my view, the Religion Clauses—the Free

Exercise Clause, the Establishment Clause, the Religious Test Clause, Art VI, cl. 3, and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not to affect one's legal rights or duties or benefits.").

D. Washington's Defense of Its Program Is Unpersuasive Because the Funding Cases Are Inapposite and the Promise Scholarship Program Is Not a Neutral Law of General Applicability.

Washington offers two principal arguments in defense of its program. First, the state contends that its policy does not violate the Constitution because this Court has previously held that "the legislature's decision not to fund the exercise of a constitutional right does not infringe that right." (Pet'r Br. at 23) (quoting *Rust v. Sullivan*, 500 U.S. 173, 193 (1991)). Second, Washington maintains that its program is a neutral law of general applicability that simply reflects the distinction between secular and religious instruction, a distinction that has been approved in this Court's jurisprudence. Neither of these defenses is persuasive.

The first argument fails because it does not address the asserted constitutional defect in Washington's policy. The problem with the policy is not that it violates a supposed right to a state-subsidized religious education. Neither the Free Exercise Clause, nor any other provision of the Constitution, confers such a right. The policy is unconstitutional because it uses a religious classification as a basis for exclusion from an otherwise generally available government benefit program. The program thus violates the neutrality requirement embodied in the Religion Clauses.

The conclusion that Washington's program unconstitutionally discriminates against students who choose religious instruction is tied closely to the specific structure of the program. It would make a constitutionally significant difference if, for example, Washington had decided only to fund scholarships at public colleges and universities. One of the results of such a decision would be that the state would not subsidize theological instruction (per Washington's definition). But Washington would have achieved that objective through a religion-neutral—and constitutionally permissible—policy that distinguishes between public and private education. A student challenging such a program based on the Religion Clauses would not have a viable claim, because the program would not have used a religious classification as a basis for discriminatory treatment.

The funding cases that Washington cites in support of its argument are irrelevant precisely because none involved the government's use of religion as a basis for granting or denying an otherwise generally-available benefit. In *Maher v. Roe*, 432 U.S. 464 (1977), *Harris v. McRae*, 448 U.S. 297 (1980), and *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court upheld funding programs that favored childbirth over abortion. In *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), the Court upheld a Congressional tax subsidy that favored non-lobbying activities over lobbying, and that favored veterans' groups over non-profit organizations dedicated to other causes. In *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), the Court evaluated Congress' use of "general standards of decency and respect for the diverse beliefs and values of the American public" as criteria for evaluating grant applications. None of these cases sheds any light on the question whether government may use a religious classification as the basis for exclusion from a benefit program.

The abortion cases in particular highlight the weakness of Washington's argument. In *Maher*, for example, the Court noted that the abortion right "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." 432 U.S. at 474. Similarly, the Court in *Rust* observed that "Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." 500 U.S. at 193. The Court made this statement even while acknowledging that, by using its funding power to further its chosen goals, the government "necessarily discourages alternative goals." *Id.* at 194.

This type of analysis is inapplicable in a case that implicates the neutrality requirement mandated by the Religion Clauses. Consider the above-quoted passage from *Maher*, if applied to the classifications at issue in this case: "The First Amendment implies no limitation on the authority of a State to make a value judgment favoring [students who would use a subsidy to pursue a secular major] over [students who would use a subsidy to pursue a religious major], and to implement that judgment by the allocation of public funds." Such a statement could not be reconciled with the Religion Clauses' neutrality mandate. Similarly implausible is the notion that this Court would countenance the government's decision to "discourage" private individuals' pursuit of religious instruction. In any event, the Court in *Maher* itself alluded to the significant difference between the abortion right and religious liberty when it distinguished abortion from "the significantly different context of a constitutionally imposed 'governmental obligation of neutrality' originating in the Establishment and Freedom of Religion Clauses of the First Amendment." *Id.* at 474 n.8.

Washington's second principal defense is that its scholarship regulations are a "neutral law of general applicability." For that reason, Washington contends, the Promise Scholarship program does not violate students' free exercise rights, and the program should not be subject to strict scrutiny.

Washington's characterization of its scholarship program defies both common sense and this Court's jurisprudence. The analytical concept of a "neutral law of general applicability" is most closely associated with this Court's decision in *Smith*, 494 U.S. 872. The Court in that case used the term to describe an Oregon law that generally prohibited drug use. Other cases that the *Smith* majority characterized as involving neutral laws of general applicability include *United States v. Lee*, 455 U.S. 252 (1982) (law requiring payment of Social Security taxes); *Gillette v. United States*, 401 U.S. 437 (1971) (law establishing the military selective service system); and *Braunfield v. Brown*, 366 U.S. 599 (1961) (Sunday closing laws). Each of the laws at issue in these cases incidentally affected religious practices, but none even mentioned religion, and none was passed with an intent to affect religion in any way. By contrast, the Promise Scholarship program facially discriminates on the basis of religion and reflects a conscious effort to enforce a government policy prohibiting the use of public funds for religious instruction. The "neutral law of general applicability" line of cases is thus inapposite.

Similarly unpersuasive is Washington's contention that its policy is neutral because it simply reflects the constitutionally permissible distinction between secular and religious instruction. While this distinction may have relevance when evaluating education or educational materials offered by the government itself, it has no application here. In a program like the Promise Scholarship, there is no possibility that students' educational choices will be attributed to the government. As this Court

explained in *Zelman*: "[W]e have repeatedly recognized that no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement." 536 U.S. at 654-55.

Washington therefore cannot reasonably fear that funding *any* major—including theology—chosen by an eligible student would result in governmental endorsement of religion. To the contrary, a program that otherwise allows students to choose any course of study must include students majoring in theology if the program is to comply with the Constitution's neutrality mandate: "[T]he guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger*, 515 U.S. at 839. At bottom, Washington's argument ignores the "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens*, 496 U.S. at 250.

II THE PROMISE SCHOLARSHIP PROGRAM VIOLATES THE VIEWPOINT NEUTRALITY REQUIREMENT IMPOSED BY THE FREE SPEECH CLAUSE.

A. The Promise Scholarship Program Should Be Evaluated Under Limited Public Forum Principles.

Washington's Promise Scholarship program is unconstitutional for the further reason that it discriminates against religious expression, in violation of the Free Speech Clause. Specifically, the nature of the program brings it within the limited public forum doctrine, and its exclusion of students who major in theology is a form of viewpoint discrimination.

The limited public forum doctrine holds that the government is subject to First Amendment limitations when it voluntarily provides its resources to facilitate private expression. In most of this Court's limited public forum cases involving religious expression, the resource provided by the government was an actual meeting place. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar*, 454 U.S. 263. But in *Rosenberger*, 515 U.S. 819, the Court applied the limited public forum doctrine to a funding program that subsidized the printing costs of student publications.

Regardless of whether the forum consists of a meeting place or a funding program, the Free Speech Clause imposes two basic limitations on government's ability to restrict access to that forum. A "restriction must not discriminate against speech on the basis of viewpoint." *Good News*, 533 U.S. at 106. And "the restriction must be reasonable in light of the purpose served by the forum." *Id.* at 107 (internal quotation marks and citation

omitted). Washington's Promise Scholarship program fails both of these tests.

The conclusion that the Promise Scholarship program violates the Free Speech Clause is compelled by this Court's analysis in *Rosenberger*. The funding program at issue in that case had been created to subsidize the activities of groups "related to the educational purpose of the University of Virginia." *Rosenberger*, 515 U.S. at 824 (internal quotation marks omitted). Among other things, the program subsidized the printing costs of a variety of student publications. However, the university had a policy that no money from the fund could be used for "religious activity," which the policy defined as "any activity that primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality." *Id.* at 825 (internal quotation marks omitted). Based on this policy, the university refused to pay the printing costs of a student publication that addressed issues from a Christian editorial perspective.

The Christian student group sued, and this Court ultimately invalidated the university's funding program. The Court first concluded that the program was a limited public forum, albeit "more in a metaphysical than in a spatial or geographic sense." *Id.* at 830. The Court then held that the university had engaged in impermissible viewpoint discrimination by denying funding on the basis of the publication's religious editorial viewpoint. *See id.* at 836-37.

Limited public forum principles should apply to Washington's Promise Scholarship program for the same reason that the Court applied them to the funding program at issue in *Rosenberger*. Each program was established by the government to facilitate private expression. In *Rosenberger*, the subsidized expression consisted of student publications. Washington's scholarship program subsidizes the pursuit of learning. For purposes of the First Amendment, this is a distinction without a

difference, because the Free Speech Clause protects both types of expression from governmental interference. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) ("The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach.") (internal citations omitted). Just as the government has no legitimate interest in regulating student speech on the basis of viewpoint, so too it has no such interest in adopting viewpoint-based regulations that affect students' choice of what to study.

B. The Promise Scholarship Program's Exclusion Of Theology Majors Is Classic Viewpoint Discrimination.

Because the Promise Scholarship program is governed by limited public forum principles, its discrimination against students who choose to major in theology violates the Free Speech Clause. First, under this Court's decisions in *Good News, Rosenberger, Lamb's Chapel,* and *Widmar*, Washington's policy of excluding theology majors from its scholarship program is a classic form of viewpoint discrimination. In fact, Washington candidly acknowledges that its funding restriction does not apply to religion as a subject matter, but only to religion taught from a devotional or faith-based perspective. (Pet'r Br. at 5-6). *Cf. Rosenberger*, 515 U.S. at 831 ("By the very terms of the [funding] prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints.").

Second, and perhaps more fundamentally, it is unreasonable to exclude students who major in theology from a program broadly dedicated to making a college education more affordable for low and middle-income students. *See Good News*,

533 U.S. at 122 (Scalia, J., concurring) ("Lacking *any* legitimate reason for excluding the Club's speech from its forum—'because it's religious' will not do—respondent would seem to fail First Amendment scrutiny regardless of how its action is characterized. Even subject-matter limits must at least be reasonable in light of the purpose served by the forum.") (internal citations and quotation marks omitted). The government has no legitimate interest in encouraging students to choose a secular major over a major in theology.

Washington was not required to establish the Promise Scholarship program. But "[h]aving done so, [it] has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms." *Widmar*, 454 U.S. at 267. The same First Amendment principles that preclude government from denying religious speakers access to generally available facilities or funds (*see Good News, Lamb's Chapel, Widmar, Rosenberger*) prohibit Washington from excluding otherwise eligible theology majors from its scholarship program.

CONCLUSION

The Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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In The

Supreme Court of the United States

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, ET AL.

Petitioner,

v.

JOSHUA DAVEY,

Respondent.

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE NATIONAL LEGAL FOUNDATION

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INTEREST OF THE *AMICUS*[1]

Amicus Curiae The National Legal Foundation (NLF) is a 501c(3) public interest law firm dedicated to the defense of First Amendment liberties and to the restoration of the moral and religious foundation on which America was built. Since its founding in 1985, the NLF has litigated important First Amendment cases in both the federal and state courts. The NLF has gained valuable expertise in the area of First Amendment law, which it believes will assist this Court in deciding this case. The NLF has an interest, on behalf of its constituents and supporters, in arguing on behalf of people of faith.

This brief is filed pursuant to the consent of the counsel of record for all parties.

SUMMARY OF THE ARGUMENT

The Free Exercise Clause of the United States Constitution allows the State of Washington to encourage religion. It also prohibits it from being hostile to religion. However, in its Promise Scholarship Program, Washington deliberately chose not to encourage religion, but instead to be hostile to it by imposing unique disabilities one those seeking theological training.

This decision by Washington violates the intent of the Framers of the Religion Clauses. Although more often associated with Establishment Clause jurisprudence, this Court has acknowledged that hostility towards religion also violates the Free Exercise Clause. By looking at the limited

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[1] No counsel for any party has authored this brief in whole or in part. No person or entity has made any monetary contribution to the preparation or submission of this brief, other than the amicus curiae, its members, and its counsel.

data from the Drafters of the First Amendment, at the Virginia Statute of Religious Freedom, at James Madison's Memorial and Remonstrance, at Justice Story's Commentaries on the Constitution, and at the Religious Test Clause of the Constitution, one can discern the principles animating the Free Exercise Clause. First, the Clause protects actions, not just beliefs. Second, the Clause was designed to prevent burdens from being imposed on the basis of religion. Third, religion should not be "leveled" with other aspects of our public life. This is closely related to the idea of encouraging religion. However, even if one rejects the principle of encouragement, an alternative plausible construction of the Free Exercise Clause would require non-cognizance of religion. This principle would likewise prohibit hostility. For all these reasons, Washington's Program violates the Free Exercise Clause and the judgment of the Ninth Circuit should be affirmed.

ARGUMENT

I. THE FREE EXERCISE CLAUSE ALLOWS GOVERNMENT TO ENCOURAGE RELIGION AND PROHIBITS GOVERNMENT HOSTILITY TOWARDS RELIGION.

This case is about Washington State's deliberate choice between encouraging religion, being neutral to religion, or being hostile to religion. When it chose to enact the Washington Promise Scholarship Program, it could have included or excluded the funding of religious education. Including religion could arguably be characterized as encouraging religion or as being neutral towards religion. While Amicus believes that the better characterization is that inclusion would have constituted neutrality, neither characterization is problematic since either would be permissible under this Court's Religion Clause jurisprudence.

First, it is a First Amendment commonplace that government should be neutral towards religion. *See, e.g., Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001); *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 839 (1995); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 215-18 (1963).

However, this Court has not construed the neutrality principle as antithetical to encouraging religion, at least in certain senses of that word. And this is not surprising, for as this Court stated in a much-cited passage from its opinion in *Zorach v. Clauson*, 343 U.S. 306, 313 (1952), "[w]e are a religious people whose institutions presuppose a Supreme Being."

Specifically, the following words have appeared in no less than ten Supreme Court opinions by the following justices: "When the state encourages religious instruction . . . it follows the best of our traditions." *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 400-01 (1993) (Scalia & Thomas, JJ,, concurring); *Allegheny County v. ACLU*, 492 U.S. 573, 657 (1989) (Kennedy, White & Scalia, J.J., & Rehnquist, C.J., concurring in the judgment in part and dissenting in part) *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 554 (1986) (Burger, C.J., & White & Rehnquist, J.J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 74 (1985) (O'Connor, J., concurring); *Meek v. Pittenger*, 421 U.S. 349, 386 (1975) (Burger, C.J., concurring in the judgment in part and dissenting in part); *Meek v. Pittenger*, 421 U.S. 349, 386 (1975) (Rehnquist & White, J.J., concurring in the judgment in part and dissenting in part); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 813 (1973) (White, J., dissenting, joined in part by Burger, C.J., & Rehnquist, J.) (opinion applying also to two consolidated cases); *Lemon v. Kurtzman*, 403 U.S. 602, 661 (1971) (White, J., concurring in two consolidated cases and dissenting in two consolidated cases); *Walz v. Tax Com. of New York*, 397 U.S. 664, 671 (1970) (Burger, C.J.,

& Black, Stewart, White, & Marshall, J.J.); and *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952) (Vinson, C.J., & Reed, Douglas, Burton, Clark, & Minton, J.J.).[2]

What this Court has ruled out is hostility towards religion. In each of the "neutrality" cases cited above, hostility is painted as the opposite of neutrality; and in each of the "encouragement" cases cited above, excepting only *Lemon v. Kurtzman*, hostility is also set in juxtaposition to encouragement. Furthermore, while the prohibition on hostility may be more familiar in an Establishment Clause context,[3] this Court has made it clear that the prohibition on hostility is also a stricture of the Free Exercise Clause. First, many cases cited above indicate that the prohibition on hostility arises from both of the Religion Clauses. Furthermore, and importantly for the instant case, this Court has stated that hostility is prohibited by the Free Exercise Clause alone.

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993), this Court stated that "[t]he Free Exercise Clause protects against government hostility which is masked, as well as overt." In *Lukumi*, Justice Souter noted in his concurring opinion that

> [t]here appears to be a strong argument from the Clause's development in the First Congress, from its origins in the post-Revolution state constitutions and pre-Revolution colonial charters, and from the philosophy of rights to which the Framers adhered, that the Clause was originally understood to preserve a right to engage in activities necessary to fulfill one's duty to one's God.

Id. at 575-76 (Souter, J., concurring).

[2] All but Justice O'Connor's are positive invocations of this proposition. Justice O'Connor noted that the proposition was inapposite as used by appellants.

[3] One *very* rough indicator of this fact can be demonstrated by searching this Court's opinions electronically. Searching for the words "hostile" and "hostility" in the same sentence with "Establishment Clause" produces five times as many results as when searching for those words in the same sentence with "Free Exercise Clause."

Joshua Davey is trying to fulfill his duty to his God. The Washington legislature, in carving out an exception for theology majors, has demonstrated hostility toward actions carried out pursuant to that duty. Thus, the exception is unconstitutional under the principles articulated in the *Lukumi* opinions.

While a main point of Justice Souter's concurrence was to question the validity of the rule laid down in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), that dispute need not be settled to recognize the validity of some aspects of Justice Souter's assertions. As Justice Souter stated, the scholarship on this point is not uniform. However, this Amicus brief will address those items that are less speculative and more easily demonstrated. On the basis of this historical data alone, it is clear that Washington's Program is hostile to religion and thus violative of the Free Exercise Clause.

As Justice Souter noted, one of the indications that the Free Exercise Clause was designed to "preserve a right to engage in activities" is the development of the Clause. While the debates over the final language of the Free Exercise Clause are not recorded, one important change has been noted by many scholars: over the course of twenty drafts, the language of freedom of conscience was replaced with freedom to exercise religion. *See, e.g.*, John Witte, Jr., *Religion and the American* Constitutional Experiment: Essential Rights and Liberties 72 (2000). Not only religiously motivated beliefs, but also religiously motivated actions, were to be protected from government hostility.

A. The Framers of the Free Exercise Clause Intended it to Prohibit Hostility.

However, accepting this premise, one must look elsewhere for what exactly the Framers considered government hostility to be. As this Court has stated, it "has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia Statute of Religious Freedom. *Everson v. Bd. of Educ.*, 330 U.S. 1, 13 (1947). James Madison's Memorial and Remonstrance Against Religious Assessments has similarly been cited as the document that cleared the way for the passage of the Virginia Statute. *Id.* Justice Douglas also specifically noted the Memorial's relevance to Free Exercise principles. *Walz v. Tax Com. of New York*, 397 U.S. 664, 706 (1970) (Douglas, J., dissenting).

1. Virginia's battle over religious liberty is a leading example of the prohibition of hostility.

The background of these documents and the assessment controversy that engendered them has been well documented in this Court's opinions. *See, e.g., Everson,* 330 U.S. at 9-15. For purposes of this brief, it suffices to point out that the Virginia Statute of Religious Freedom, written by Thomas Jefferson, shows at least one type of hostility that would come to be forbidden by the Free Exercise Clause. Although Jefferson's concern in this regard was with the establishment of religion, he implicitly had a concern for the hostility that "unestablished" sects would face. *See* Thomas

Jefferson, *Virginia Statute of Religious Freedom*, Article 1, *in* 3 *Annals of America* 53-54 (1968).[4]

Perhaps the most telling passage from Jefferson's Bill is the second Article which states that "no man shall be . . . enforced, restrained, molested, or burdened, nor shall otherwise suffer on account of his religious opinions." *Id.* at 54. Jefferson, along with the Virginia General Assembly when it passed the statute in 1786, was concerned with acts that went beyond encouragement, created an establishment, and might subsequently lead to the suppression of the free exercise of religion. The kind of discouragement, or hostility, that the Bill prevented was, in part, one in which people would be "burdened." Undeniably, the Washington Promise Scholarship Program burdens Davey. All eligible students not studying theology are given access to state funding which is denied to him solely because he seeks to study in preparation for a career in ministry—a quintessential exercise of religion.

Similarly, the Memorial and Remonstrance demonstrates a concern that the free exercise of religion not be burdened. As pointed out by Justice Thomas in *Rosenburger v. Rector and Visitors Of University of Virginia*, 515 U.S. 819, 854-55 (1995) (Thomas, J., concurring), Madison, at several points in the Memorial was concerned that some sects would be comparatively burdened by not being eligible for benefits extended to other sects. When speaking of the exemption made to the Quakers and Mennonites, Madison asked, "Ought their religions to be endowed above all others . . . ?" James Madison, *Memorial and Remonstrance Against Religious Assessments*, Article 4, *in* 3 *Annals of America* 5, 18 (1968). While various

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[4] Often referred to by this Court as the Virginia Bill for Religious Liberty. These documents are, in fact, the same and will hereinafter be cited to as "The Virginia Statute of Religious Freedom" as titled in the Annals of America.

members of the *Rosenberger* Court differed over the proper reading of the *Memorial* as an insight into *Rosenberger's* Establishment Clause question, there are additional passage of the *Memorial* that are unambiguous with regard to the present Free Exercise question. In article 12 of the *Memorial*, Madison charges that "[i]nstead of leveling as far as possible every obstacle to the victorious progress of Truth, [it] . . . would circumscribe it with a wall of defence." *Id.* at 12-13. While this assertion certainly addresses Establishment Clause values, its broader implication is germane to Free Exercise values: government should not place obstacles in the path of the free exercise of religion; rather it should level such obstacles. Washington has not leveled the field; rather it has placed religious education at a unique disadvantage. Such hostility violates the Free Exercise Clause.

2. Joseph Story understood the Clause as allowing government encouragement of religion.

As this brief has noted previously, the court has seen hostility and encouragement as opposites. Therefore, it is important to note that in Joseph Story's influential *Commentaries on the Constitution of the United States,* the connection between encouragement and the other Free Exercise values noted in this brief is explicitly stated. First Story notes that "it is the especial duty of government to foster, and encourage [religion] among all the citizens." Joseph Story, *Commentaries on the Constitution of the United States* § 1865 (Arthur E. Sutherland ed., Da Capo Press 1970) (1833). Then he notes that the Religion Clauses go beyond freedom of conscience to include action and that they contain an anti-leveling component:

> Probably at the time of the adoption of the Constitution, and of the amendment to it, now under consideration, the general if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation. Documents from Virginia's battle over religious liberty evince an attitude of prohibition towards government hostility.

Id. at § 1865.

This Court has noted that it has rejected this passage from Story to the extent that it limits encouragement to the Christian religion, *Wallace v. Jaffree*, 472 U.S. 38, 52 (1984). However, as we have seen earlier, this Court has also repeatedly stated the ongoing validity of state encouragement of religion. Similarly, Story's concern about the leveling of Christianity with other religions no longer animates this Court's Free Exercise jurisprudence, but the principle can be more broadly construed for the proposition that government need not level religion with all aspects of public life. Thus, when we look at the Washington Program in light of the historical evidence, we see that it fails to encourage religious exercise. In fact, it is hostile to it. Indeed, it goes beyond leveling religion by uniquely burdening religious education as compared to all other education. Because the Program violates these principles, it violates the Free Exercise Clause.

B. A Stricter View of the Virginia Materials Still Prohibits Hostility

However, even should this Court reject Story's reading of the Religion Clauses, there is another reading of the *Memorial and Remonstrance* that is not dependent on this approach and which therefore still leads to a conclusion of

unconstitutionality. A stricter view of the *Memorial's* Free Exercise principles suggests that the government simply must not be cognizant of religion. *See* Philip Munoz, *James Madison's Principle of Religious Liberty*, Am. Pol. Sci. Rev., Feb. 2003, 17. A non-cognizance reading of the Free Exercise Clause would also prohibit government hostility towards religion. While this view does not espouse a need for the government to foster and encourage religion, it would require government to refrain from taking notice of religion when formulating laws and policies. A non-cognizant government would logically have to refrain from acting with hostility towards religion.

The *Memorial and Remonstrance* provides internal evidence for such a reading. In the first article Madison argued that religion should be "wholly exempt" from civil society's cognizance. James Madison, *Memorial and Remonstrance Against Religious Assessments,* Article 1, *in* 3 *Annals of America* 16 (1968). In the fourth article, Madison accuses Patrick Henry's Assessment Bill of "violat[ing] equality by subjecting some to peculiar burdens." *Id.* at 18. Under a view of non-cognizance, the government could not subject anyone to a peculiar burden on account of religion because the government was required to be blind to religion. It follows that a government blind to religion cannot be hostile to religion.

The doctrine of non-cognizance, while not allowing for the encouragement and fostering of religion still prohibits hostility towards religion. The state of Washington has not adopted a view of non-cognizance, but has explicitly made itself cognizant of religion and those who want to teach it. They go out of their way to exclude those people from generally applicable financial aid programs. Thus, even under this alternative Free Exercise value, the Program is unconstitutional.

C. The Constitutions Proscription of Religious Tests is an Example of the type of hostility they intended the entire Free Exercise Clause to prohibit.

Finally, some insight into the animating principles of the Free Exercise Clause can be gained by looking to another provision of the Constitution, namely the third clause of Article VI, which prohibits religious tests for holding office. Again, one sees a proscription against hostility towards religion. The Framers were aware of the pitfalls that would accompany a nation that was hostile towards religious views. Adopting religious tests would allow those not as tolerant as the framers to "arm [themselves] with all the terrors of the civil power to exterminate those, who doubted [their] dogmas, or resisted its infallibility." Joseph Story, *Commentaries on the Constitution of the United States* § 1841 (Arthur E. Sutherland ed., Da Capo Press 1970) (1833). Another explanation of this clause is provided almost six years before its adoption. In the Virginia Statute of Religious Freedom, Thomas Jefferson said:

> the proscribing [of] any citizen as unworthy [of] the public confidence by laying upon him an incapacity of being called to offices…unless he profess or renounce this or that religious opinion is depriving him injuriously of those privileges and advantages to which in common with his fellow citizens he has a natural right.

Thomas Jefferson, *Virginia Statute of Religious Freedom*, Article 1, *in* 3 *Annals of America* 53-54 (1968).

Chief Justice of the Supreme Court Oliver Ellsworth realized the damaging effects a religious test would have. Ellsworth called religious liberty an "important right of human nature." Oliver Ellsworth, *On a Religious Test for Holding Public Office, in*, 3 *Annals of America* 169 (1968). Ellsworth recognized that the right of a person to exercise his

beliefs without government intrusion was a right that set the United States apart from other countries. His letter, written during the ratification of the Constitution, gives perhaps the best description of this important right. Ellsworth wrote that if a person "be a good and peaceable person, he is liable to no penalties or incapacities on account of his religious sentiments; or, in other words, he is not subject to persecution." *Id.* at 170. He also recognized that this right of human nature limited the power that government could exercise over a persons' religious conscience, saying that government has "no right to set up an inquisition and examine into the private opinions of men." *Id.* at 172.

The prohibition of religious tests is an extension of the effect the framers wanted the Free Exercise Clause to have. A religious test would allow the government to not only discourage, but abolish the ability of certain religious persons to hold public offices. For example, as recognized by this Court, an adoption of a religious test in the form of clergy disqualification for political office would force those clergy to choose between religiously motivated conduct, i.e., the free exercise of religion, and the right to hold public office. *See McDaniel v. Paty*, 435 U.S. 618 (1978).

The Washington Promise Scholarship Program in the present case, as was the clergy disqualification in *McDaniel*, is facially hostile towards religion. The state has created a general program for which Joshua Davey qualified. However, because of his deeply held convictions about becoming a minister, this benefit has been taken away. Because he has qualified for the scholarship and has a right to it, the exception that disqualifies him is hostile to religion and an infringement of his constitutional right to freely exercise his religion.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit Court of Appeals should be affirmed.

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Respectfully submitted

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